In The

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. 352

CIVIL

COUNTY OF THURSTON IN THE STATE OF NEBRASKA, ET AL., PETITIONERS,

V.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ALFRED D. RAUN,
County Attorney of Thurston County,
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Counsel for Petitioner.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No._____

CIVIL

THE COUNTY OF THURSTON, IN THE STATE OF NEBRASKA; DWIGHT MORGAN, LESTER GUSTIN, AND THOMAS FREY, AS MEMBERS OF THE BOARD OF EQUALIZATION OF SAID COUNTY; JAMES S. TATE, AS COUNTY ASSESSOR AND AS A MEMBER OF THE COUNTY BOARD OF EQUALIZATION; FLOYD E. GRIFFIN, AS COUNTY CLERK AND AS A MEMBER OF THE COUNTY BOARD OF EQUALIZATION; AND AMY JACKSON, AS COUNTY TREASURER OF SAID COUNTY, PETITIONERS,

V.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

May It Please The Court:

The petition of the County of Thurston in the State of Nebraska, et al., respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The United States of America filed four complaints (R1, 12, 19, 27) which were consolidated for trial and appeal (R50, 151), seeking to enjoin the levy and collection of taxes in the future upon land owned in fee simple by individual Indian citizens of Nebraska by the County of Thurston, which taxes were levied in compliance with the constitution and laws of the state upon all property uniformly by value for the support of necessary governmental functions of the county, the state, school districts and municipalities.

The lands involved had been upon the tax rolls of the state and its governmental subdivisions for many years, most of them had been previously owned by white people, and it was conceded that all of these lands would still be subject to taxation unless they could be relieved therefrom under authority of the Act of Congress of June 20, 1936 (49 U. S. Stat. 1542), as amended on May 19, 1937 (50 U. S. Stat. 188) Title 25 U. S. C. A. Sec. 412a, which are set out in full on pages 11-12 of the brief herein (R103, Par. 9). This law as amended purported to exempt from state taxation "homesteads" purchased by Indians out of restricted funds, and held subject to restrictions against alienation.

Approximately 24% of the residents of Thurston County, Nebraska, are Indians, and 24% of all farm lands in the county are Indian lands that is, "trust" or "allotted" lands, title to which remains in the federal

government (R70, Par. 4). Such lands are admittedly exempt from taxation, except that in the Brown Bill, 39 Stat. 865, congress provides that the county may levy taxes on certain of this land, but no lien should attach, and if a statement were filed in the office of the County Treasurer at the end of the year that the Indian had no funds available with which to pay the tax, it must be cancelled (R, last half p. 53; first half p. 54). The taxes paid under this set-up are negligible (R, table at bottom of p. 68).

The act involved here would exempt a large additional amount of land.

Please look at Exhibits 2-E and 2-F (R73-74), and consider the following facts: The Indians in these school districts being citizens, vote for all school bond and special tax levies (R71, Par. 5), and receive all of the local governmental benefits plus the benefits given by the federal government. The tribal and Brown Bill lands are not liable for the payment of any taxes, nor for the retirement of the bonds. The area marked "white land" includes that owned in fee simple by individual Indians, and which has heretofore been subject to taxation. The act here involved would exempt from taxation the Indians' homes, but would shift the burden of school district bonds and all other taxes to his white neighbor's home up to the constitutional limit, and then it would deprive the school district and all other taxing units of their necessary support.

In School District 16 Indian lands held in trust, and consequently untaxable, constitute 43% of the area. This school district has found it impossible to maintain

its school. The school board has so far provided school privileges only by accepting help from the Indian Agency, which in return therefor has taken over duties imposed by state law upon the school board. (Testimony, Gabe E. Parker, Superintendent Indian Agency, R. bottom half p. 63.)

Recovery was also prayed of taxes paid for the years 1936 to 1939, inclusive. These taxes had been distributed as required by state law to the state and the several school districts and municipalities within the county (R71, Par. 6). The state, the school districts and the municipalities were not made parties to the complaint.

Defendant contended: 1. that congress lacked constitutional power to prevent a state and its subdivisions from taxing real estate owned by any individual citizen in fee simple, either by labeling it an instrumentality of the federal government or any other device; 2. that in no event would congress have power to pass a valid statute which would cripple or destroy necessary functions of a local or state government and which discriminates between citizens, and between governmental subdivisions; 3. that the act was being construed so as to exempt from taxation properties which were not homesteads; and 4. that taxes paid by any private citizen could be recovered only by following the simple method provided by state statutes in connection with which the cities, school districts and other subdivisioins, to which the taxes had been distributed, would be indispensable parties.

The district court found generally on all points for the plaintiff, wrote an opinion (R79) and entered four

decrees (R126, 130, 133, 139). Upon appeal, the United States Circuit Court of Appeals for the Eighth Circuit on May 22, 1945, affirmed (R161).

B.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The first two of the issues just mentioned were decided adversely to petitioners herein by extending the decision of this court announced in *Board of County Commissioners* v. *Seber*, 318 U. S. 705, 63 Sup. Ct. 920, 87 L. Ed. 807. That was the first case and so far is the only case in which the validity of the acts in question was ever considered by this court. That decision may have been justified upon the facts in that particular case and in view of the enabling act of the State of Oklahoma in which there was reserved in congress power to legislate relating to the land of Indians in that state, the constitution of that state and the decision of the Supreme Court of Oklahoma in *Wynn* v. *Fugate*, 149 Okla. 210, 299 Pac. 890, holding that this reservation of power included the power to remove land owned by individual Indians from the state tax rolls. Petitioners respectfully point out that the broad language in the opinion of the court in the Seber case at the top of page 715 in 318 U. S. Reports, to-wit: "The acts of 1936 and 1937 are constitutional" is not justified for application in those states unrestricted by an enabling act coupled with a decision of their own state supreme court similar to that of Oklahoma, nor to cases based upon facts similar to the facts in this particular case. Further than that, the holding in the Seber case is not sustained by the authorities cited by the court as a foundation.

This question of constitutional law and construction of a federal statute was probably wrongly decided by the lower court. It is of extreme importance to a great many states and the citizens thereof and should be re-examined and modified, or its application properly limited.

The third issue is an important question of federal law which has not been but should be settled by this court. It involves the proper construction and application of a federal statute.

By act of June 20, 1936 (49 Stat. at Large 1542) congress purported to exempt from taxation *"all land"* subject to restrictions against alienation, owned by an Indian. In the House Committee report upon the bill to amend this act it was said: "Under this mistaken legislation great quantities of otherwise taxable property such as *business buildings, farm lands which are not homesteads*, etc., are exempt from taxation." Congress thereupon amended the act to exempt *"all homesteads* heretofore purchased * * *," and by proviso limited the size of the tract which could be claimed for a homestead to one hundred sixty acres of agricultural land, or to town property which had cost not to exceed five thousand dollars.

The lower court disregarded completely the restriction inherent in the word "homesteads" and construed the act as though it read "every Indian may claim as exempt one hundred sixty acres of agricultural land or any town property costing not to exceed five thousand dollars."

Under this construction many tracts which are not homesteads were held to be exempt from taxation.

This question of construction and application of a federal statute is one of great importance in all of the many states where Indians reside. It probably has been incorrectly decided in the lower court and should be examined and correctly decided by this court as a guide for the proper administration of this act in those states where the act may be found applicable.

The fourth issue involves an important question of general law of great public interest which probably was incorrectly decided by the lower court, contrary to the law of the State of Nebraska and to decisions of its Supreme Court.

An Indian citizen living off of the reservation in Thurston County, Nebraska, is in the same position as any other citizen, so far as his duty to follow the laws of the state are concerned. There is no transfer of privilege or immunity from a guardian to a ward by the mere establishment of the relationship, and an Indian does not become a sovereign invested with all of the privileges and immunities claimed by the sovereign upon becoming the ward of the sovereign. This point is further developed in the brief where pertinent evidence is quoted and citations of authority set out.

Possibly it has nothing to do with the decision, but many of the cases dealing with Indians contain romantic and sentimental reference to the plight of these poor people who were so ill-treated by the white man in the early days. In the same mood Congress has now in effect said to the Indians "if you need a shirt, we will furnish it," then has done so by taking the shirt off of the back of the Indian's white neighbor.

The sentiment is all right, the furnishing of the shirt is all right, but it can be done, and it must be done, under our constitution, at the expense of the entire nation instead of at the expense of the Indians' white neighbors in Thurston County and in other counties similarly situated, and without imposing an undue and discriminatory burden upon the State of Nebraska and its local governmental units.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 13,007, Civil, *County of Thurston in the State of Nebraska, et al., Appellant,* v. *The United States of America, Appellee,* and that the said decree of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

THE COUNTY OF THURSTON IN THE STATE OF NEBRASKA, ET AL.,

By: ALFRED D. RAUN,
County Attorney of Thurston County,
WALTER R. JOHNSON,
Attorney General of Nebraska,
H. EMERSON KOKJER,
Deputy Attorney General of Nebraska,
Counsel for Petitioners.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No.----------

CIVIL

COUNTY OF THURSTON IN THE STATE OF NEBRASKA, ET AL., PETITIONERS,

V.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the District Court (R79-97) is reported in 54 F. Supp. 201, and the opinion of the United States Circuit Court of Appeals (R161) is reported in 149 F. Supp. 485.

II.

JURISDICTION.

The jurisdiction of the District Court was invoked by the United States under Sec. 24 (1) of the Judicial

Code, as amended, 28 U. S. C. A. Sec. 41 (1). The jurisdiction of the Circuit Court of Appeals was invoked under Sec. 128 of the Judicial Code, as amended, 28 U. S. C. A. Sec. 225 (a). The jurisdiction of this court is invoked under Sec. 240 of the Judicial Code, 28 U. S. C. A. 347 (a) and Rule 38 of the Revised Rules of this court.

The date of the decree to be reviewed is May 22, 1945 (R161).

Questions Presented.

1. Whether the acts of June 20, 1936, and May 19, 1937, are constitutional as applied to land in Nebraska.

2. Whether or not the acts in question can be applied to exempt the land described in the complaint from taxation, owing to the fact that the results would be to cast an undue, inequitable, discriminatory and unjust burden upon the defendants and the people of Thurston County, Nebraska, in whose behalf they appear, and would be oppressive and destructive of the local governmental units and prevent the carrying out of their essential function.

3. Whether the lands involved are homesteads within the meaning of the act of May 19, 1937.

4. Whether an action may be maintained on behalf of individual Indian citizens to recover taxes paid without following state procedure and without joining as parties the state and the other taxing subdivisions to which the taxes had been distributed.

Statutes Involved.

The act of June 20, 1936, 49 Stat. 1542, provides:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That there is hereby authorized to be appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of $25,000, to be expended under such rules and regulations as the Secretary of the Interior may prescribe, for payment of taxes, including penalties and interest, assessed against individually owned Indian land the title to which is held subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of an Indian, where the Secretary finds that such land was purchased with the understanding and belief on the part of said Indian that after purchase it would be nontaxable, and for redemption or reacquisition of any such land heretofore or hereafter sold for nonpayment of taxes.

"Sec. 2. All lands the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress.

"Approved, June 20, 1936."

The act of May 19, 1937, 50 Stat. 188, provides:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Con-*

gress assembled, That section 2 of Public Law Numbered 716 of the Seventy-fourth Congress, being an Act entitled 'An Act to relieve restricted Indians whose lands have been taxed or have been lost by failure to pay taxes, and for other purposes,' is hereby amended to read as follows:

"Sec. 2. All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress: *Provided,* That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior; *And provided further,* That the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town, or city property, not exceeding in cost $5,000, to be designated as a homestead.

"Approved, May 19, 1937."

III.

STATEMENT OF THE CASE.

With the exception of facts relating to the occupancy of certain of the lands involved, a full statement of the case has been given under the heading "A" in the petition, and in the interest of brevity the statement is not to be repeated at this point, but the following will be added as a supplement to that statement.

As to many of the tracts thought to be exempted, there is no evidence that they ever could be used as home-

steads, or that there was any intention on the part of the owner to so use them. The following are examples concerning which the record negatives the claims:

The land claimed exempt on behalf of Walter Tyndall in count 2, case 299, contains no house or other buildings. Walter Tyndall was the head of a family, and until the time of his death lived with them in a home on other land, which was trust land and consequently already exempt from taxation. So having a home which was already exempt, plaintiff claims for him the right to have other farm land described in this count exempted from taxation, on the theory that it is his "homestead" (Rec., bottom of p. 109 and top of p. 110).

Henry Rogue, in count 9, case 299, claimed two tracts to be exempted. At the time of the trial one tract was no longer involved because it had been purchased in the name of the United States and held in trust, and apparently this is the tract where he made his home. The other tract the plaintiff now seeks to have exempted was leased to tenants from March 1, 1929, to date except possibly in the year 1938. Henry Rogue died in 1939, and neither he nor his widow nor family lived on this tract, nor is there any evidence that they ever intended to (Rec. pp. 110, 111, count 9).

In count 8, case 235, the plaintiff seeks to have exempted for Wahme Burt a tract of land, the title to which was in Lizzie Cook Blackbird, who evidently died before this act was passed, as her heirs were determined on September 4, 1935. Since her death neither her widower nor any of her other heirs, who are themselves the heads of their own families, and children of heads of other families who have died and apparently have homesteads

of their own, lived on this land. Annie Blackbird White, one of the heirs who owns an undivided fourth of this tract, lives on other land and claimed exempt as her homestead in count 7, case 235 (Rec. p. 112, count 8).

Charles C. Stabler has not lived upon the land sought to be exempted for him since its purported selection as a homestead, and there is no evidence to show that he ever intended to, or now intends to use the place as a home (R. 113, count 3).

The land claimed exempt in count 1, case 299, was owned by Kate Whitespirit Seymour. Upon her death an undivided one-fourth of the title passed by the law of descent to James Seymour, her widower, who now lives upon it. The Seymours had no children, and there is nothing to show that James Seymour, when he acquired that undivided onefourth interest, had anyone dependent upon him, but in any event he had no title to three-fourths of this tract which was owned by three half sisters and one half brother of Kate Whitespirit Seymour. One brother is a non-resident of Nebraska; none of these other heirs live upon this land, and so far as the record shows, have no intention of ever making it their home (Rec. p. 114, count 1).

The land described in count 4, case 299, is claimed exempt on behalf of Madeline Rickman Thomas Tebo. The land was owned by her former husband, Joseph Thomas, who died March 24, 1935. She lives with her new husband on other land, and her children live with her. There is no evidence which indicates that any of them intend to make a home upon this land, and it has

been rented out and farmed by tenants since March 1, 1936 (Rec. p. 115, count 4).

Exemption is claimed for the tract described in count 6, case 299, for the heirs of Agnes Wells Lovejoy Grant, who bought the property in 1922, and died prior to March 1, 1936. There is no evidence that she ever used it as or intended it to be her home. None of her several heirs, who are adults with families of their own, and in one case children of a deceased heir, ever occupied the land, which in fact is not occupied at all, and there is no evidence that they ever intend to (Rec. p. 116, count 6).

IV.

SPECIFICATION OF ERRORS.

1. The lower court erred in finding and holding that the acts of June 20, 1936, and May 19, 1937, are constitutional as applied to lands in Nebraska.

2. The lower court erred in finding and holding that the acts above referred to could be applied to exempt the lands described in the complaint from taxation for the reason that the result would be to cast an undue, inequitable, discriminatory and unjust burden upon the defendants and the people of Thurston County, Nebraska, in whose behalf they appear and are oppressive and destructive of the local governmental units and prevent the carrying out of their essential function.

3. The lower court erred in finding and holding that all lands which (a) have been purchased before May 19, 1937, out of the trust or restricted funds of individual Indians; (b) are held subject to restrictions against

alienation or incumbrance except with the approval of the Secretary of the Interior; (c) were selected for designation as a homesead by the owner or owners with the approval of the Secretary of the Interior; (d) are not more than a total of one hundred and sixty acres in extent in agricultural and grazing land, or cost not more than five thousand dollars if urban property, regardless of whether or not the land could be used as a home by the owner, or whether he ever intended it to be his home, and whether or not it had any of the other incidents commonly understood to be required in a homestead.

4. The lower court erred in finding and holding that an action may be maintained on behalf of an Indian citizen to recover taxes paid by him without following state procedure, and that the State of Nebraska, the school districts and the municipalities, to whom the taxes had been distributed were not indispensable parties.

These errors all occur in the opinion of the District Court. The Circuit Court of Appeals in its decision merely adopted the findings and opinion of the District Court.

V.

ARGUMENT.

Point 1.

Congress is Given No Authority, Either Express or Implied, in the Constitution of the United States to Pass Laws Which Deprive the States of the Power Which is Indispensable to Their Existence to Tax All Privately

Owned Real Estate Within Their Borders. The People Have Reserved to Themselves by the Ninth and Tenth Amendments to the Constitution All Powers Not Delegated Therein to the United States. The Acts Involved Deny Defendants and the People They Represent the Equal Protection of the Laws Guaranteed to Them by Sec. 2, Art. IV of the Constitution, and Sec. 1 of the Fourteenth Amendment Thereto. There is no Such Thing as a "Paramount Power" of Congress Greater Than, and Underived From the Constitution of the United States.

State Tax Commissioner of Utah v. *Malcom P. Aldrich, et al.*, 315 U. S. 789, 86 L. Ed. 1193.

Bicknell v. *Comstock*, 113 U. S. 149, 28 L. Ed. 962.

Board of County Commissioners of the County of Creek, State of Oklahoma v. *Evelyn Seber, et al.*, 63 Sup. Ct. 920, 87 L. Ed. 1094, 130 Fed. (2d) 663, 38 Fed. Supp. 731.

Coyle v. *Okla*, 221 U. S. 559.

Gibbons v. *Ogden*, 22 U. S. (9 Wheat. 1) 194, 6 L. Ed. 23.

Heckman v. *United States*, 224 U. S. 413, 56 L. Ed. 820, 32 Sup. Ct. 424.

McCury v. *United States*, 246 U. S. 263, 62 L. Ed. 706.

Oklahoma Tax Commission v. *United States*, 63 Sup. Ct. 1284, 87 L. Ed. 1612.

Shaw v. *Gibson-Zahniser Oil Corporation*, 276 U. S. 575, 48 Sup. Ct. 333, 72 L. Ed. 709.

Larkin v. *Paugh*, 276 U. S. 431, 72 L. Ed. 640.

Union Pacific Railroad Company v. *Peniston*, 21 L. Ed. 787.
United States v. *Board of Commissioners, Osage County*, 26 Fed. Supp. 270.
United States v. *Hester*, 137 Fed. (2d) 145.
United States v. *Mathewson*, 32 Fed. (2d) 745 (8th C. C. A.).
United States v. *Mummert*, 15 Fed. (2d) 926 (8th C. C. A.).
United States v. *Nez Perce County, Idaho*, 50 Fed. Supp. 966.
United States v. *Ramsey*, 271 U. S. 467, 471, 70 L. Ed. 1039, 1041, 46 Sup. Ct. 559.
United States v. *Rickert*, 188 U. S. 432, 47 L. Ed. 532, 23 Sup. Ct. 478.
United States v. *Schurz*, 102 U. S. 378.
United States v. *Swain County, North Carolina*, 46 Fed. (2d) 99, 53 Fed. (2d) 300, 43 Stat. 376.
Work v. *Mummert*, 29 Fed. (2d) 393 (8th C. C. A.).
Wynn v. *Fugate*, 149 Okla. 210, 299 Pac. 890.
13 St. at Large 47, Sec. 4.
13 St. a Large 47, Sec. 5.
Constitution of Nebraska, Art. VIII, Sec. 2.
Sec. 77-201, 1929 Neb. St.
U. S. Constitution, Art. IV, Sec. 3.
U. S. Constitution, Art. IX, Amendments.
U. S. Constitution, Art. X, Amendments.
U. S. Constitution, Fourteenth Amendment.
25 U. S. C. A., par. 412a.

Everyone will agree that before the adoption of the Constitution, the various states were as separate and distinct as the nations now about to band themselves together under the United Nations Charter. Each state was entirely and absolutely sovereign as regarded their respective powers and rights. Each had the right to tax to an unlimited degree, and there was no repositary of power anywhere which could limit this right to tax in the slightest degree.

When the states banded themselves together under the constitution, they delegated to the central government and to its congress certain powers. There was no place for the central government then formed to get powers except from the states which formed it. Recalling the history of the colonies, leading up to the adoption of the constitution, it is inconceivable to think that they would have granted to the central government the power to take away from them in the slightest degree the indispensable right to tax. At any rate, had they done so the provision granting such power would be easily found in the constitution. The question here is as simple as it is fundamental. Where in the constitution of the United States is to be found any provision which directly or by implication gives congress the power to enact a law which will deprive the state and local governments of the right to tax uniformly the property owned in fee simple individually by its citizens?

We do no cite the case of *State Tax Commissioner of Utah* v. *Malcom P. Aldrich, et al.*, 315 U. S. 789, 86 L. Ed. 1193, as in point upon the facts with this case, but in the concurring opinion of Mr. Justice Frankfurter

there appears the clearest and most concise statement of principles involved that we have ever discovered, to-wit:

> "The taxing power is an incident of government. It does not derive from technical legal concepts. The power to tax is coextensive with the fundamental power of society over the persons and things made subject to tax. Each State of the Union has the same taxing power as an independent government, except insofar as that power has been curtailed by the Federal Constitution.
>
> "The taxing power of the States was limited by the Constitution and the original ten amendments in only three respects: (1) no State can, without the consent of Congress, lay any imposts or duties on imports or exports, except as necessary for executing its inspection laws, Art. I, Sec. 10 (2); (2) no State can, without the consent of Congress, lay any tonnage duties, Art. I, Sec. 10 (3); and (3) by virtue of the Commerce Clause, Art. I, Sec. 8 (3), no State can tax so as to discriminate against interstate commerce."

When Daniel Webster argued these same principles back in 1824, when the constitution was only a few years old, in the case of *Gibbons* v. *Ogden*, 22 U. S. (9 Wheat. 1) 194, 6 L. Ed. 23, Chief Justice Marshall stated that they were true. There has been no change in the constitution in this regard, and each state of the union still has the same taxing power as an independent government, except as curtailed *by the constitution* and *not* by an act of congress.

The following provisions of the constitution make it clear that except for those powers granted to congress

or those necessarily implied to carry out the powers expressly granted, all other powers were withheld from congress.

> "Section 3. * * * The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."
>
> Art. IV, Sec. 3, U. S. Constitution.

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others *retained by the people.*"
>
> Art. IX, Amendments to the U. S. Constitution.

> "The *powers not delegated* to the United States by the Constitution, nor prohibited by it to the States, *are reserved* to the States respectively, or *to the people.*"
>
> Art. X, Amendments to the U. S. Constitution.

The Fourteenth Amendment to the Constitution of the United States provides in part as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

While the law which is involved in this case is one passed by the Congress and not one passed by a state, it must be noted that under the provisions of the Four-

teenth Amendment to the United States Constitution, above quoted, no state can pass a law which would deny to any person within its jurisdiction the equal protection of the law. In other words, the state could not pass a law which would provide that the property owned by the Indian citizens, or by the Swedish or by the Negro citizens, or by the German citizens would be relieved from taxation, while the property of all others would be taxed. Is it probable, then, that Congress is authorized to pass a law which will require the State of Nebraska to collect taxes from a part of its citizens but not from the others, and do something the Constitution forbids it to do?

ENABLING ACT.

It is important that the Enabling Act of the State of Nebraska be studied in connection with this question, and it is also most important before accepting as precedent cases involving Indian land in any other state, that the Enabling Acts of those states be studied. A number of these states entered the Union on the basis of Enabling Acts which specifically reserved in Congress the right to legislate and control lands owned by Indians. There is no such reservation in the Nebraska Enabling Act. Most, if not all, of the states with such provisions in their Enabling Act also adopted similar provisions giving Congress the power to legislate as to lands owned by Indians in their Constitutions.

The only restriction as to taxation in the Nebraska Enabling Act (13 U. S. Stat. at Large 47) is in the third paragraph of Section 4 thereof, quoted as follows:

"That the people inhabiting said territory do agree

and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States, and that the lands belonging to citizens of the United States residing without the said state shall never be taxed higher than the land belonging to residents thereof; and that no taxes shall be imposed by said state on lands or property therein *belonging to* or which may hereafter *be purchased by the United States.*"

Section 5 of the Enabling Act, after providing for the adoption of a State Constitution and certifying the same to the President of the United States, provides as follows:

"Whereupon it shall be the duty of the President of the United States to issue his proclamation declaring the state admitted into the Union on an *equal footing with the original thirteen states,* without any further action whatever on the part of Congress."

RESTRICTIONS AGAINST ALIENATION.

There is a great deal of confusion in the cases dealing with Indian lands due to the loose use of the term "restrictions against alienation or encumbrance." Restricted land may be taxed or may not be taxed, depending upon wholly independent conditions.

The restrictions have nothing whatever to do with the power to tax. The power of Congress to provide for restrictions which will prevent an Indian from mortgaging or selling his land without consent of the Secretary of the Interior is unquestioned. It is true also that Congress may remove such restrictions and in proper

cases again impose them. The distinction between such power and the power to remove from taxation is clear enough, but the use of the term has not been clear in many of the cases decided. The distinction is pointed out in the following cases among others: *McCurdy* v. *United States*, 246 U. S. 263, 62 L. Ed. 706; *Shaw* v. *Gibson-Zahniser Oil Corporation*, 276 U. S. 575, 72 L. Ed. 709; *Oklahoma Tax Commission* v. *U. S.*, 63 Sup. Ct. 1284, 87 L. Ed. 1612; *United States* v. *Hester*, 137 Fed. (2d) 145.

As an example, assume that the United States should purchase a farm in Canada for an Indian out of his trust fund, and after acquiring title should execute a deed conveying the land to the individual Indian. It could not be questioned but that Congress would have the right to provide for restrictions against alienation or encumbrance in the deed, but we take it no one will argue that Congress would have the power to declare that that farm in Canada is a government instrumentality and must, therefore, be withdrawn from the tax rolls of Canada.

As said in the concurring opinion in *State Tax Commissioner of Utah* v. *Malcom P. Aldrich, et al.*, supra, "Each state of the union has the same taxing power as an independent government, except insofar as that power has been curtailed by the Federal Constitution."

THE MUMMERT CASES.

In *United States* v. *Mummert*, 15 Fed. (2d) 926, decided by the 8th Circuit Court of Appeals, the syllabus is as follows:

"Land previously patented in fee simple can be taxed when purchased by Indians with consent of Secretary of Interior, with proceeds of restricted land held by the government for the use of said Indians, though deed contains restriction against alienation except with consent of Secretary of the Interior."

This was an action brought by the United States, as trustee and guardian for an Indian, *Emily Blackbird* v. *David C. Mummert.* It complained of identical acts of levying taxes such as are complained of in the instant case, and asked that collection be enjoined. To the bill of complaint, the defendants filed a motion to dismiss. The motion was sustained, and the United States appealed. The court, in its opinion, said:

"The decisive question involved is thus stated by appellees:

" 'Is it legal for the state of Nebraska and its political subdivisions to levy general taxes upon real estate previously patented in fee simple and taxed, which have been purchased by noncompetent Omaha Indians, wards of the federal government, with the consent of the Secretary of the Interior, with the proceeds of restricted lands held by the government for the use and benefit of said Indians, even though the conveyance contains a restriction against alienation except with the consent of the Secretary of the Interior, and with no other restrictions or limitations whatsoever imposed on the title?'

"The statement of appellant is not substantially different * * *. All these lands were subject to state taxation before purchase for the use and benefit of the several Indian wards, as alleged in the bill. This

court is committed strongly to the view that lands formerly subject to taxation are not exempt therefrom by a purchase and holding of this nature (citing cases). * * * In the very late case of Sunderland v. United States, 266 U. S. 226, 45 S. Ct. 64, 69 L. Ed. 259, it was argued that, under the doctrine announced in McCurdy v. United States, Congress cannot authorize the Secretary of the Interior to impose restrictions on released Indian lands that have passed into private ownership; * * * but it is readily seen, as implied in the opinion in the Sunderland Case, that although the interposition of the strong shield of the government is justified, to the end that the Indians be not overreached or despoiled in respect of their property, this does not necessarily imply that ordinary taxation for the benefit of the government, whose protection they enjoy, is calculated to despoil the Indian in respect of his property.

"The spoliation which the law aims to prevent is fraud and oyerreaching in the matter of alienation. * * * There is in this language, we think, an implied recognition of the right of state taxation under situations such as are here presented. This accords with the view entertained by this court as announced in a number of cases. We think the county of Thurston, Nebraska, was not deprived of its right of taxation by the conveyances made, and that the decree below should be affirmed.

"It is so ordered."

In the case of *Work* v. *Mummert*, 29 Fed. (2d) 393 (8th C. C. A.), which was a case very similar to the case just cited, the syllabus is as follows:

"1. The state as well as federal government has sovereign powers, and, unless government projects necessitate use of property for government purposes, taxing thereof should remain with the state.

"Land previously subject to state taxation remains subject thereto where purchased with approval of Secretary of Interior under Act March 1, 1907, and Act May 29, 1908, for incompetent Indian with proceeds of lands allotted to such Indian under Act Aug. 7, 1882, though deed to land purchased for Indian contained restriction against alienation except with consent of Secretary of Interior, notwithstanding Nebraska Enabling Act provision that no taxes shall be imposed by state on property belonging to or which may thereafter be purchased by the United States."

In its opinion the court said:

" 'The primary question is whether it can be said that the property in question is essentially for the performance of a governmental instrumentality.'

"This is not a question of whether or not the lands purchased for the Indian ward are an "instrumentality' of government, but rather, *whether the land in question is government property* used for a government purpose, plan and project, and herein lies the question for determination. * * *

"It is well to keep in mind that the state has sovereign powers as well as the nation, and unless government projects necessitate use of property for government purposes, taxing thereof should remain with the state. * * *

"It is practically conceded that the case of U. S. v. Mummert is based upon facts substantially the

same as those in the case at bar. The government's position is, that the reasoning under which that case is decided is so contrary to the general line of authorities that it should be overruled. While the Mummert Case does not expressly so declare, we are satisfied that upon consideration of the cases upon which it is founded, this court, in deciding the former Mummert Case, was constrained to find that the courts in formerly considering this question had in mind that when the Secretary of the Interior purchased, or permitted the purchase by the Indian ward of lands which had formerly been taxable by the state and municipal government, knowing that they had been so taxable, he was but exercising the authority granted to him, and must have realized that he was purchasing, or permitting the Indian to purchase such lands with the taxable burden upon them, and that the power to declare property exempt from taxation as government property, or used for a governmental purpose, did not extend to facts as in that case presented. We also are constrained to so hold. * * *"

The case of *United States* v. *Mathewson*, 32 Fed. (2d) 745 (8th C. C. A.), is to the same effect as the Mummert cases.

POWER OF CONGRESS DISCUSSED BY FEDERAL COURT.

One of the ablest discussions of this question is contained in the opinion of the District Court of the United States in the case of *United States* v. *Swain County, North Carolina*, 46 Fed. (2d) 99. Although this case was later reversed by the Circuit Court of Appeals in 53 Fed. (2d) 300, it was reversed specifically on the

ground that the trial court had made an error in finding that the lands in question in that suit were owned by the individual Indian, whereas they were actually owned by the federal government. The syllabus therein contained, which is pertinent to our discussion, is as follows:

> "Federal statute attempting to exempt from taxation lands of 'Eastern Band of Cherokee Indians' in North Carolina *held* unconstitutional, state of North Carolina having exclusive power to exempt lands within its borders from taxation."

This was a suit in equity brought by the United States against the sheriff and other officers of Swain County to enjoin the duly constituted authorities from the collection of taxes assessed by them for state and county purposes against the lands of the Eastern Band of Cherokee Indians. The defendants for reply asserted that the act of Congress, 43 Stat. 376, attempting to exempt these lands from taxation was void and unconstitutional. The act contains this provision:

> "That such restricted and undivided property shall be exempt from sale for unpaid taxes for two years from the date when such taxes become due and payable."

The court in its opinion said:

> "Has Congress the power to exempt these lands from state and county taxes? * * * In the Articles of Confederation of 1777 the states were careful to give to the Congress the power, only, to regulate 'trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated.' It is therefore clear

that the states which banded themselves together and won their freedom from Great Britain understood that the lands within their borders, occupied by Indians, belonged to these individual states, and Congress could only manage the affairs of the Indians and regulate their trade when such Indians were not members of any of the respective states. * * *

"In the well-considered case of Union P. Railroad Co. v. Peniston, 18 Wall. 29, 21 L. Ed. 787, the Supreme Court of the United States, in an opinion by Justice Strong, well and clearly stated:

" 'That the taxing power of the State is one of its attributes of sovereignty; that it exists independently of the Constitution of the United States, and underived from that instrument; and that it may be exercised to an unlimited extent upon all property, trades, business, and avocations existing or carried on within the territorial boundaries of the State, except so far as it has been surrendered to the Federal government, either expressly or by necessary implication, are propositions that have often been asserted by this court. And in thus acknowledging the extent of the power to tax belonging to the States, we have declared that it is indispensable to their continued existence. * * * And the Constitution contains no express restriction of this power other than a prohibition to lay any duty of tonnage, or any impost, or duty on imports or exports, except what may be absolutely necessary for executing the State's inspection laws. * * * The States are, and they must ever be, coexistent with the National government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibi-

tions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise.

"Counsel for complainant contends that the winding up of the tenancy in common of these Indians is in some way an instrumentality of the government, and he cites in support of that contention the famous case of McCulloch v. Maryland, 4 Wheat. 316, 436, 4 L. Ed. 579; but I cannot find support for this contention in the opinion of Chief Justice Marshall in this famed case. * * *

"It will be seen that even in this case where an instrumentality of the government, to-wit, the United States Bank, owned real estate within the state of Maryland, the Chief Justice holds that the state of Maryland could levy a tax upon its real estate.

"* * * The land on which they now live, according to my conception, was never owned by the federal government, and the President and the Senate have never made any treaty with this band providing that their land should be exempt from state and county taxation. I cannot see, therefore, that the levying of taxes by Swain county on these lands at the same rates that other lands are assessed in that county can in any way be regarded as a tax burden on an instrumentality of the government of the United States. * * *

"* * * but the fact that they are wards of the government gives no more right to exemption from taxation than would be given to wards of other guardians scattered throughout North Carolina. There are many orphans throughout the state who have guardians, but the federal government has no power to exempt their lands from taxation. There

are many flood sufferers and earthquake victims throughout the United States and the world, to whose relief the federal government has contributed money; but certainly it could not be argued that the lands which such sufferers might own within the boundaries of the various states could be exempted by the federal government from state taxation. Surely it cannot be argued that an Indian or an Indian tribe or family could go into the various states either actually or by an agent, and purchase with personal funds rural lands or city lots and claim exemption from state taxation by reason of the fact that they are Indians. Nor could Congress exempt such lands from state taxation. The particular character of a citizen of the United States or of a state does not take away from the several states the sovereign power of taxing his lands within their respective boundaries, unless such lands were donated, allotted, and set apart to such individual by the federal government from and out of federal lands or public domain. * * *

"It is contended by counsel for complainant, in his brief, that:

" 'From this legislation it is the policy of Congress, where it is deemed necessary for the proper protection of the property of the Indians and the right of the United States to supervise their property and affairs, to exempt their lands and property from taxation.'

"This statement is undoubtedly true with reference to all lands in the public domain which were assigned to Indians by the United States, but I can find no instance in all the writings on Indian affairs, or in the multitude of judicial opinions where the Congress has ever undertaken to exempt land from

taxes where such land has been purchased by Indians from the state, as in the case at bar. * * *

"For the foregoing reasons I am compelled to conclude and hold that the act of Congress of June 4, 1924, insofar as it attempts to exempt these Cherokee lands from state and county taxation, is unconstitutional and void."

This case was reversed by the Circuit Court of Appeals in 53 Fed. 300, but the decision is based upon the fact that the Circuit Court of Appeals found that the trial court erred in finding that:

"And it should be noted that what we have here is not *as was thought by the court below, a tax levied upon the property of the wards of the government, but an attempt to tax property which had been deeded to the govenrment itself* to be used by it in behalf of its wards in the exercise of a power given it by the constitution. The power to tax is the power to destroy, and if the tax here can be sustained this property held by the government for a constitutional purpose can be destroyed in its hands."

We are unable to see any distinction in fact between the attempted exemption of these lands by Congress from the previous unsuccessful attempts by the Congress to accomplish the same purpose by providing that all lands purchased by the government for Indians should have the benefit of any provisions of the act relating to land held in the government's name in trust for the Indians. Upon the issuance of a fee simple patent to an Indian all restrictions as to taxation of the land conveyed are removed. *Larkin* v. *Paugh*, 276 U. S. 431, 72 L. Ed. 640.

To a similar effect that when a patent has been issued by the president and recorded in the general land office, the title of the United States is divested, and its power over the land conveyed has ceased. *Bicknell* v. *Comstock*, 113 U. S. 149, 28 L. Ed. 962, also *U. S.* v. *Schurz*, 102 U. S. 378.

In the case of *Union Pacific Railroad Company* v. *Peniston*, 21 L. Ed. 787, the syllabus of the case is as follows:

> "1. The taxing power of a state is one of its attributes of sovereignty; it exists independently of the constitution of the United States, and may be exercised to an unlimited extent except so far as it has been surrendered to the federal government.
>
> "3. The property of the Union Pacific Railroad, although the corporation was created by Congress, and the company is an agent of the general government, designed to be employed and actually employed in the legitimate service of the government, both military and postal, is not exempt from state taxation.
>
> "4. No constitutional implications prohibit a state tax upon the property of an agent of the government, merely because it is the property of such agent."

In that case Lincoln County, Nebraska, had levied a tax against the Union Pacific Railroad. The railroad company sought an injunction on the ground that it was an agency of the federal government and could not be taxed. In affirming the judgment of the circuit court holding that such property was subject to taxation by

the state, Justice Strong (in addition to the quotation from his opinion in *United States* v. *Swain County*, supra) said:

> "No one ever doubted that before the adoption of the Constitution of the United States, each of the states possessed unlimited power to tax, either directly or indirectly, all persons and property within their jurisdiction, alike by taxes on polls, or duties on internal production, manufacture or use, except so far as such taxation was inconsistent with certain treaties which had been made. And the Constitution contains no express restriction of this power other than a prohibition to lay any duty of tonnage, or any impost, or duty on imports or exports, except what may be absolutely necessary for executing the state's inspection laws. As was said in Lane County v. Oregon, 7 Wall. 77, 19 L. Ed. 104: 'In respect to property, business and persons within their respective limits, the power of taxation of the states remained, and remains entire, notwithstanding the Constitution.' It is, indeed a concurrent power (concurrent with that of the general government), and in the case of a tax upon the same subject by both governments, the claim of the United States as the supreme authority must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the states commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the state constitutions, or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the National

Government. There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the extent just indicated, it is as complete in the states as the like power within the limits of the Constitution is complete in Congress. Such are the opinions we have expressed heretofore, and we adhere to them now."

It will be contended by plaintiff that the case of *United States* v. *Board of Commissioners, Osage County,* 26 Fed. Supp. 270, holds that lands owned by individual Indians can be taken off the state tax rolls. In this connection, however, it should be noted that the holding was based on the wording of the Enabling Act of that state as interpreted by its own Supreme Court. The court's comment upon that subject is as follows:

"The enabling act, Sec. 1, 34 Stat. 267, June 16, 1906, providing for the admission of Oklahoma and the Indian Territory as a state, made express provision that the constitution of Oklahoma should not limit or affect the authority of the government of the United States to make any law or regulation respecting Indians or their lands or property. It has been determined by the Oklahoma supreme court that general laws were suspended from operation on Indian lands so long as such lands were exempt from taxation by laws of Congress, or by treaty. Wynn v. Fugate, 149 Okla. 210, 299 Pac. 890. By the adoption of the terms of the enabling act Oklahoma has disclaimed its right and authority to limit or affect the power of the government to make any laws or regulations respecting Indians, their lands, property or other rights which the government might have made had the territory em-

bracing the same not been created into a state. This carries with it the right to exempt such lands from taxation as well as the right of Congress to reimpose restrictions thereon or to constitute them federal instrumentalities (citing cases). There cannot be an invasion of state rights because a condition of statehood was the reserving by the federal government of power and authority over Indians, their lands and property, and the contention of the defendants with respect thereto is therefore untenable."

In the above entitled case, on page 275 of the opinion, the court cites *Shaw* v. *Gibson-Zahniser Oil Corporation*, 276 U. S. 575, 48 Sup. Ct. 333, 72 L. Ed. 709, as an authority for the statement that it is within the power of Congress to define particular lands as federal instrumentalities, and to exempt them from taxation, and that such congressional action is not an invasion of state rights or contrary to the federal Constitution. The case referred to also involved lands in the State of Oklahoma, and the provisions of its enabling act would be important in the decision of this question. In any event the case is not authority for the holding claimed for it, but rather for the contention that the defendants here claim, as will be noted from its syllabi, which we quote:

"1. The interest of a lessee of land purchased for a full-bood Creek Indian from accumulated royalties on allotted land, with a provision against alienation, is not such an instrumentality of government as to be exempt from state taxation.

"What instrumentalities of government will be held free from state taxation, though Congress has not expressly so provided, cannot be determined

apart from the purpose and character of the legislation creating them.

"3. Lands purchased for a full-blood Creek Indian out of royalties on allotted land, from one in whose hands they are subject to taxation, continue so subject, although not subject to alienation without consent of the Secretary of the Interior."

This case and *McCurdy* v. *The United States,* 246 U. S. 263, are examples of a number of cases where the court said in effect that if Congress had intended the lands to be tax exempt, they would have said so. It is now argued that such cases are authority to uphold the power of Congress to say so if they choose. In these cases, however, the power of Congress was not considered nor passed upon at all.

In the McCurdy case, supra, syllabus points 2 and 3 read as follows:

"2. Congress did not empower the Secretary of the Interior to exercise control over private property purchased with trust funds released by him to an Osage Indian allottee by the provision of the Act of April 18, 1912 (37 Stat. at L. 87, chap. 83), § 5, authorizing him in his discretion to pay to any Osage allottee, under rules and regulations to be prescribed by him, all or any part of the Osage trust funds held for the benefit of such allottee, when satisfied that such payment would be to the manifest best interests and welfare of such allottee.

"3. Lands purchased from their private owners with trust funds released to an Osage Indian allottee by the Secretary of the Interior under the authority of the Act of April 18, 1912 (37 Stat. at L. 87, chap.

83), § 5, and conveyed first in trust and later by the trustee to the Indian individually, could not be exempted from state taxation by a clause in the deed from the trustee making the land inalienable without the consent of the Secretary of he Interior."

In this case, the power of Congress under the Constitution was directly challenged, but Mr. Justice Brandeis, who delivered the opinion, stated that it was not necessary to consider that point as there were other grounds on which the decree must be reversed.

THE SEBER CASE.

The District Court based his decision, which was adopted by the Circuit Court, upon the holding of this court in *Board of County Commissioners* v. *Seber,* 63 Sup. Ct. 920, 87 L. Ed. 1094, and upon what he terms a "paramount power" of Congress to legislate on behalf of Indians.

While the result in the Seber case may have been right, the following part of the decision is most certainly wrong, 318 U. S. p. 715:

> "The Acts of 1936 and 1937 are constitutional. From almost the beginning the existence of Federal power to regulate and protect the Indians and their property against interference even by a state has been recognized. Cf. Worcester v. Georgia, 6 Pet. (U. S.) 515, 8 L. Ed. 483. This power is not expressly granted in so many words by the Constitution, except with respect to regulating commerce with the Indian tribes, but its existence cannot be doubted. In the exercise of the war and treaty powers, the United States overcame the

> Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people needing protection against the selfishness of others and their own improvidence. Of necessity the Unted States assumed the duty of furnishing that protection and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic."

After this decision was announced we were sure in our own minds that it was wrong. Later, having failed through extensive legal research to find a satisfactory basis for any different view of it we began to quiz fellow lawyers in order to check up on our own reasoning. Out of over two hundred we failed to find a single one who thought this part of the case was correctly decided.

In reading over the paragraph from the opinion above quoted, one will see that the court itself gave a halting and far from convincing basis for holding the acts constitutional. Examine it sentence by sentence, and check the reasoning; note also, that the cases on which it is grounded refer either (1) to trust propery, that is, property with *title* in the United States, or (2) to cases which were decided upon wholly other grounds, with perhaps an obiter statement thrown in to the effect that "if congress had intended to exempt the property from taxes, they would have expressly done so."

The case of *Shaw* v. *Oil Corporations*, 276 U. S. 575, 72 L. Ed. 709, comes the closest to supporting the decision, but even that case holds that the land was not

exempt from state taxation. The power of Congress to exempt it was not in issue, and the statement in the opinion to the effect that Congress might have legally exempted it was not necessary to the decision and is mere dictum. This case really lends support to petitioners' contention as will be noted from the syllabus which we puoted, supra, pages 37-38.

Now let us consider the reasoning in the Seber case. As to the court's statement that "from almost the beginning the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized," we find no objections, but the inference which appears to have been drawn from the statement, that this gives Congress unlimited power to do something not permitted by the constitution, is clearly not warranted. A good answer to the inference that Congress must for some reason fight and hamstring the orderly functions of the states and their local subdivisions in order to protect the Indians, is given by the court in *United States* v. *Mummert*, 15 Fed. (2d) 926, as follows:

> "* * * but it is readily seen, as implied in the opinion in the Sunderland Case, that although the interposition of the strong shield of the government is justified, to the end that the Indians be not overreached or despoiled in respect of their property, this does not necessarily imply that ordinary taxation for the benefit of the government, whose protection they enjoy, is calculated to despoil the Indian in respect of his property.
>
> "The spoliation which the law aims to prevent is fraud and overreaching in the matter of aliena-

> tion. * * * There is in this language, we think, an implied recognition of the right of state taxation under situations such as are here presented."

The Seber opinion then goes on with reference to power to exempt land from taxation as follows: "This power is *not expressly granted* in so many words by the Constitution, except with respect to regulating commerce with the Indian tribes, *but its existence cannot be doubted.*

The power of Congress must be found in the Constitution, and if it is not there, they do not have it. We are not arguing for a narrow construction of any constitutional provision. We merely point out that there *is no* provision in the Constitution which by any stretch of the imagination can be held to grant power to Congress to say to the citizens of a state "your fundamental and necessary power to tax the land belonging to individual Indians, individual Negroes, individual Swedes, individual Jews or individuals of any other race or class group, is hereby cancelled or withdrawn to any degree."

The depricating reference itself to the clause of the Constitution permitting Congress to regulate commerce with the Indian tribes indicates that the court thought the same thing petitioners do, which is that this clause does not lend any support for these acts. The acts, by their own terms, apply only to lands "heretofore purchased." No "commerce" is involved in providing that a tract of land which an Indian already owns shall be exempt from taxation. The purpose of the legislation was to preserve for the Indians a home, so it can hardly be considered that it was the intent of Congress to take

the taxes off of his home so he could more easily sell it, and in any event we take it that if any of us bought the land we would not be entitled to keep it free from taxation, and if we could not buy it free from taxation the law exempting it while in the hands of the Indians would not promote commerce.

As to the statement relating to this power to the effect that "but its existence cannot be doubted," we think there must have been a confusion as to what power the court was talking about. The power of Congress to remove the land of an individual from state taxation while still standing in his name, has never before been directly passed upon by this court. The power of Congress to legislate generally on behalf of Indians had been before the court many times, as well as the power to place restrictions upon the rights of Indians to sell their land. In some of these cases such power was referred to as the "paramount power" of Congress and in some it had been said that the existence of this power could not be doubted. It is probable that this language crept into the present case as a result of reading those other cases. We believe that there is doubt in the minds of all lawyers on this subject, and that this doubt is strong enough to be termed a conviction that Congress has no such power.

The opinion then mentions that in the exercise of the war and the treaty powers the United States overcame the Indians and took possession of their land, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence, and from this the inference appears to have been drawn that of necessity,

the United States had assumed the duty of furnishing that protection and with it the authority to do all that was required to perform the obligation.

We cannot conceive what connection the power to make war has with this problem, and if there is any treaty involved, we could not find it, and apparently the attorneys for plaintiff couldn't either, as they did not point it out, so we think it safe to assume that there is no treaty. It is our belief that the court was merely referring to facts of history and not seeking to base the power to pass the present acts upon the war and treaty powers. While the recital of the plight of the Indians is touching, it is tempered so far as we are concerned by thought of the plight of the people in Thurston County, Nebraska, who under great difficulties imposed upon them by their own government are trying to maintain their homes, educate their children, and carry on their own local governmental activities, and these white citizens are actually, in many cases, in worse condition than the Indians. However, it is a question of power that we are discussing now, and while it may be that Congress has the duty to furnish food, clothing, education, land and everything else to the Indians, to none of which we object, this duty certainly does not carry with it power to pass just any kind of a law so long as it affects the Indians. Congress can do all of the things which it needs to do for the protection and education and care of the Indians without laying unjust, inequitable, discriminatory and oppressive burdens upon the white citizens and their local governmental units in Thurston County, Nebraska, and in the other counties throughout the United States where Indians live.

It is not a sufficient answer to this problem to say it is one which must be taken up with Congress. We believe it is clear that Congress has gone beyond the powers granted to it, and if that is so, it is the duty of this court to check it.

The statement that "the obligation and the power of the United States to protect and preserve these restricted, allotted lands for the Indian owners has been recognized, *Heckman* v. *United States*, 224 U. S. 413, 56 L. ed. 820, 32 S. Ct. 424, and they were held immune from state taxation as instrumentalities by which the United States provided for the welfare and education of its Indian wards. *United States* v. *Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 S. Ct. 478," means exactly what it says and no more. It says that land *held in trust by the United States* with *title in the Unittd States* is not subject to state taxation. It is attempted to bolster this statement by note 21, which reads as follows:

> "The land involved in the Rickert case was a trust allotment, rather than a restricted fee. The power of Congress over both types of allotment, however, is the same. See United States v. Ramsey, 271 U. S. 467, 471, 70 L. Ed. 1039, 1041, 46 S. Ct. 559."

As the note states, the land involved in the Rickert case was held in trust by the United States, and all that the Ramsey case holds is that "land formerly a part of the Osage Indian Reservation, which is in possession under a restricted allotment of an Indian who is not authorized to alienate it, is Indian country within the meaning of U. S. Rev. Stat., § 2145, extending the general laws of the United States to the punishment of

crimes committed in any place within the sole and exclusive jurisdiction of the United States, to the Indian country."

As to the lower court's statement that Congress has "paramount power" to pass such legislation, we hardly think anyone will seriously argue that Congress has any power above and underived from the Constitution. If anyone should make any such contention, it would be claiming for Congress the "divine right" formerly arrogated to themselves by kings and monarchs of the old world to pass such laws as it sees fit. We think, rather, that the lower court meant that Congress has the paramount power to legislate for Indians in the same way that it has the paramount power to legislate for the regulation of postmasters, rural mail carriers and other federal employees, in the sense that no other body has any right to pass laws regulating their duties. We take it that no one will claim that Congress has the power to pass a law which would have the effect of removing from a state tax roll the home owned by an individual postmaster, or a rural mail carrier.

The case of *United States* v. *Nez Perce County, Idaho,* 50 Fed. Supp. 966, was decided as it was because, as was stated in the opinion, this court had decided the question of power, which was raised there, in the Seber case. Now the lower court in this case has followed the Seber case. It is time now to re-examine that case, and we feel sure that upon a careful re-examination, this court will withdraw that part of the Seber opinion which holds the acts in question here to be constitutional, or if it finds such acts to be constitutional at all, that the appli-

cation will be limited to Oklahoma and any other state there may be which is in a similar situation as to enabling acts and state supreme court's construction thereof.

While all states should be on an equal basis as to sovereign rights, as was held in the case of *Coyle* v. *Oklahoma*, 221 U. S. 559, the fact remains that upon the question presented to the court here, the state of Oklahoma is not in the same position as is the state of Nebraska, and many other states, because in Oklahoma not only does their enabling act give Congress the power to legislate concerning Indian land, but the constitution of the state also contains this grant of power to Congress, and the Supreme Court of Oklahoma in the case of *Wynn* v. *Fugate*, 149 Okla. 210, 299 Pac. 890, holds that Congress does have the power under the enabling act and their constitution to remove lands owned by individual Indians from the Oklahoma State Tax Rolls.

Point 2.

In No Event Could the Acts in Question be Applied to Exempt Land Described in the Complaint From Taxation, Because the Result Would be to Cast an Undue Inequitable, Discriminatory and Unjust Burden Upon the Defendants and the People of Thurston County, Nebraska, in Whose Behalf They Appear are Oppressive and Destructive of the Local Governmental Units and Prevent the Carrying Out of Their Essential Functions.

Graves v. *People of State of New York, ex rel. O'Keefe*, 306 U. S. 484, 485, 487, 59 Sup. Ct. 595, 83 L. Ed. 927, 120 A. L. R. 1466.

Helvering v. *Gerhardt*, 304 U. S. 405, 58 Sup. Ct. 969, 82 L. Ed. 1427.

Helvering v. *Mountain Producers Corp.*, 303 U. S. 376, 385, 58 Sup. Ct. 623, 82 L. Ed. 907.

James v. *Dravo Contracting Co.*, 302 U. S. 134, 161.

In re Kentucky Fuel Gas Corporation, 127 Fed. (2d) 657.

Panhandle Oil Company v. *Knox*, 277 U. S. 218.

341 Stat. at Large, Sec. 8.

It is petitioners' contention that even if it could be assumed that Congress had the power to remove individually owned lands from local taxation, that in no event could a law which imposes an undue and unjust burden upon the petitioners, and which is discriminatory, oppressive and destructive of local governmental units be upheld.

We are not now complaining of tribal lands and any other lands which are held in trust by the United States for the Indians, being untaxed, but we are calling this situation to the attention of the court so it can note the burden that is already carried by the white citizen and the local government units; and we want to point out that taking additional land off of the tax roll will cause a breakdown of necessary local functions.

Defendant's Exhibit 3 (R77) is a map of Thurston County, Nebraska, showing in white all deeded land, that is, all land held by individual citizens in fee simple whether white or Indian, and the black portions show

the Indian land which is held in trust for them by the United States government and is not subject to taxation. The purpose of the complaints in the instant suit is to remove from taxation additional lands shown in white on Exhibit 3, but owned by Indians.

Similar showings are made of two school districts on Exhibit 2E (R73) and Exhibit 2F (R75).

The Indians who make up 24% of the population of Thurston County, and own about 24% of all the farm lands in the county, are citizens the same as anyone else and take part in local elections including bond elections (R70, 4-5). County funds are spent for them for roads, schools, relief, policing and all other governmental activities the same as for white citizens, except that these expenses such as that for keeping the peace is increased by the Indian population greatly in excess of their proportion in number (Exhibit 2-b, R69).

It is difficult for all of the local taxing units to raise sufficient funds to carry on their necessary functions, and if more land is taken off the tax rolls the situation will be immeasurably worse. One example where the local governmental activity has already broken down is in School District 16, where the school district found that it wasn't able to maintain the school. In order to educate their children, they have made arrangements to furnish the school building to the Indian Agency, and this federal government agency now appoints the school teachers and runs the school. But this district still has outsanding $45,000 worth of bonds which the white citizens are to have the privilege of paying (R70, 3).

With 24% of the farmlands in the county already off of the tax rolls because held in trust by the United States for the Indians, the present acts would remove from the tax rolls land owned in fee simple by individual Indians, which lands have been purchased largely from white people, and which have for years been taxed for the support of local government. The local governmental units are being deprived of taxes which are absolutely necessary if the essential governmenal functions are to be carried on.

The act of Congress involved in this case is discriminatory, oppressive and confiscatory. It discriminates between the white citizen and the Indian citizen by requiring the white citizen to pay all of the cost of the government and services furnished to both the white citizen and the Indian citizen; and it discriminates between the white citizen of Thurston County and the white citizen in most of the 3,050 other counties in the United States, because it lays an additional burden upon the white citizen in Thurston County which should be borne by all of the citizens in all of the counties in the entire United States. It discriminates against Thurston County and each governmental unit therein in favor of most of the 3,050 other counties in the United States and the governmental units in those counties where no Indian homesteads are situated.

We think it must be conceded by everyone from the facts shown that the result of this statute is both unduly burdensome and discriminatory. As a matter of law it is well settled that neither sovereign may through taxation cripple or destroy the operations of the other, nor enforce a discriminatory tax.

"3. Neither the federal nor a state government has power through taxation to cripple or destroy the operations of the other.

"4. The power now held by federal government to tax income of state officials and by state governments to tax incomes of federal officers, and the power to compel payment of taxes by persons who deal with governmental agencies exist only where the tax is non-discriminatory, and an implied immunity arises from undue interference when one governmental authority imposes its tax burden on another."

In re Kentucky Fuel Gas Corporation, 127 Fed. (2d) 657.

There has been no change in the rule that an implied immunity arises from undue interference when one governmental authority imposes its tax burdens on another. *Graves* v. *People of State of New York, ex rel. O'Keefe*, supra.

Supreme Court decisions of recent date have repeatedly emphasized that the extension of the federal power to tax the income of state officials and vice versa, of state power to tax the income of federal officials, as well as the power to tax persons who deal with governmental agencies, exists only in case the tax is non-discriminatory.

James v. *Dravo Contracting Co.*, 302 U. S. 134, 161, 58 Sup. Ct. 208, 82 L. Ed. 155, 114 A. L. R. 318.

Helvering v. *Mountain Producers Corp.*, 303 U. S. 376, 385, 58 Sup. Ct. 623, 82 L. Ed. 907.

Helvering v. *Gerhardt*, supra, 304 U. S. 405, 58

Sup. Ct. 969, 82 L. Ed. 1427.

Graves v. *People of State of New York, ex rel. O'Keefe,* supra, 306 U. S. 484, 485, 487, 59 Sup. Ct. 595, 83 L. Ed. 927, 120 A. L. R. 1466.

Exactly the same reasons exist for holding void a law which cripples or destroys a state or local government by withdrawing from taxation or from enforcing a law which withdraws individual citizens' property from taxation in a discriminatory way, as for holding void laws which lay burdensome and discriminatory taxes.

As was pointed out by Mr. Justice Holmes in his dissent in *Panhandle Oil Company* v. *Knox,* 277 U. S. 218, at page 223, the power to levy a non-discriminatory tax is no longer held to imply a power to destroy. And this unassailable principle is also applicable with reference to any claim to power to remove property from taxation.

There is, of course, in history an adequate basis for fair and even generous treatment of the Indians by the United States of America. The facts upon which this duty is based are summarized in the case of *Creek County* v. *Seber,* supra, and we will not here question either the right or power or duty of the United States to protect and provide for its Indian wards. We do wish to point out, however, that this is a duty owed by the United States as a whole, and that the burden should be imposed upon the United States as a whole. The United States is not accepting that duty and burden in a fair and equitable manner when they go into one county or one school district in a state and say in effect,

"We want to help these poor Indians, therefore we will relieve them from paying for the services which they get, along with their white neighbors, and we will do this by requiring this county and this school district to foot the bill."

We do not believe that Congress ever would have passed such an act had the unjustness of the results been called to their attention. We feel certain that they had no power to pass the act and that this court should hold it void.

Point 3.

Many of the Tracts of Land Involved are Not Homes Nor Intended to be Used as Homes, and Are Not Within the Terms of the Act of Congress Which Purports to Exempt "All Homesteads Heretofore Purchased Out of Restricted Funds of Individual Indians."

Engen v. *Union State Bank of Harvard,* 121 Neb. 257, 236 N. W. 741.

Hayes v. *Barringer,* 7 Ind. Ter. 697, 104 S. W. 937.

Hyde v. *Ishmael,* 42 Okla. 279, 143 Pac. 1044.

In re Jurgen's Estate, 87 Neb. 571, 127 N. W. 885.

Misner v. *Hill,* 92 Neb. 435, 138 N. W. 583.

Sperry Oil and Gas Company v. *Chisholm,* 282 Fed. 93.

Words and Phrases, Re "Homestead."

The lower court held that any property costing not over $5,000.00 and up to 160 acres of any agricultural

and grazing land purchased by an Indian with restricted funds must be exempted from taxation under this law if he files a paper in the office of the Register of Deeds in which the property is called a homestead, regardless of whether or not the property is used or is usable as a home and regardless of whether or not the Indian ever intended that it should be so used.

Our conviction is that Congress used the word "homestead" advisedly, in its commonly accepted meaning. Had they not so intended, there is no conceivable reason for inserting the word in the 1937 amendment, the avowed purpose of which was to limit the property which could be so exempted. Had they not meant "homestead," they would surely have had the act exempt any town property costing not over $5,000.00 and not to exceed 160 acres of agricultural or grazing land without saying anything about "homestead."

It will be noted that the 1936 law provided that *"all lands"* owned by an Indian subject to restrictions are declared to be instrumentalities of the federal government and non-taxable until otherwise directed by Congress.

In 1937, this section of the act was amended to provide that *"all homesteads"* purchased out of the trust or restricted funds of individual Indians shall be non-taxable until otherwise directed by Congress, with an additional limitation that the homestead should be selected either from the agricultural and grazing lands not exceeding 160 acres or the village, town or city property not exceeding in cost $5,000.00.

Under the law of Nebraska, a homestead is defined as the lands or lots and buildings occupied by the owner as a home for himself and his family. *Misner* v. *Hill,* 92 Neb. 435, 138 N. W. 583; *Engen* v. *Union State Bank of Harvard,* 121 Neb. 257, 236 N. W. 741.

Words and Phrases, under the term "homestead," lists a great many cases in which that word is defined, and all of them, with exception of three which will be hereinafter mentioned, give the same definition as is given in the above Nebraska cases.

There are other Nebraska cases similarly defining the homestead which is exempted under our laws from execution. The amount exempt is limited to 160 acres of land or not exceeding two lots within an incorporated city or village up to the value of $2000.00. In Nebraska under the law relating to descent, the limitation as to acreage and value does not apply except as to creditors. *In re Jurgen's Estate,* 87 Neb. 571, 127 N. W. 885. In all of these definitions however, the property must be used as a home by some person with dependents.

This definition of homestead is followed in every jurisdiction in the United States so far as we have been able to discover.

The term "homestead" in the law involved in these cases is not defined in the law itself, but it appears without doubt that Congress had in mind the commonly understood definition above described.

This belief is supported by the action which Congress took in amending the 1936 law and in the committee

reports upon which they based their action. These reports are quoted herewith:

SENATE COMMITTEE REPORT.

"The Committee on Indian Affairs, to whom was referred the bill (S. 150) providing for the repeal of section 2 of Public Law No. 716 of the Seventy-fourth Congress, being an act entitled 'An act to relieve restricted Indians whose lands have been taxed or have been lost by failure to pay taxes, and for other purposes,' having considered the same, report thereon with a recommendation that it do pass with the following amendment:

"On page 1 add a new section at the end of the bill as follows:

"Sec. 2. All homesteads heretofore purchased out of the trust or restricted funds of individual Indians are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress: *Provided*, That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior: *And provided further*, That the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town, or city property, not exceeding in cost $5,000, to be designated as a homestead.

"This proposed legislation is for the repeal of section 2 of the act of June 20, 1936, Public Law No. 716, Seventy-fourth Congress (49 Stat. L. 1542).

"The said act of June 20, 1936 (49 Stat. L. 1542) was designed to bring relief and reimbursement to

Indians who by failure to pay taxes have lost or now are in danger of losing lands purchased for them under supervision, advice, and guidance of the Federal Government, which losses were not the fault of the Indians, but were purchased with the understanding and belief on their part and induced by representations of the Government that the lands be nontaxable after purchase It was intended that such lands would be redeemed out of the fund of $25,000 authorized to be appropriated under the provisions of said act of June 20, 1936 (49 Stat. L. 1542).

"Since the passage of said act of June 20, 1936 (49 Stat. L. 1542), it was found the provisions of section 2 thereof would apply to lands and other property purchased by restricted Indian funds, which would exempt from taxation vast quantities of property, such as business buildings, farm lands which are not homesteads, etc.

"The Commissioner of Indian Affairs appeared before the committee and suggested the amendment herein proposed, which proposed amendment was adopted and herein recommended by your committee."

HOUSE COMMITTEE REPORT.

"The Committee on Indian Affairs, to whom was referred the bill (H. R. 3008) repealing section 2 of Public Law No. 716 of the Seventy-fourth Congress, being an act entitled 'An act to relieve restricted Indians whose lands have been taxed or have been lost by failure to pay taxes, and for other purposes,' having considered the same, report thereon with a recommendation that it do pass without amendment.

"This bill is for the repeal of section 2, Public, No. 716, of the Seventy-fourth Congress, passed on June 6, 1936, appearing at page 9159 of the Congressional Record.

"The legislation in Public, 716 originated as H. R. 7764. It was a simple appropriation bill to pay taxes on lands purchased by the Secretary of the Interior under a previous act of Congress for landless Indians. Taxes had accrued against these lands. H. R. 7764 appropriated $25,000 to pay said taxes because the land was in danger of being sold under tax warrants and tax assessments.

"H. R. 7764 passed the House in that form. When it was passed in the Senate, section 2 (which is sought hereby to be repealed) was added.

"It will be observed from the language of section 2, which is as follows:

"All lands the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress - -

"that it applies to all lands purchased by restricted Indian funds, and the Attorney General so held. *Under this mistaken legislation vast quantities of otherwise taxable property, such as business buildings, farm lands which are not homesteads, ex., are exempt from taxation.*

"*Obviously no one intended that the legislation should go so far.* That is apparent from the language of Senator Thomas of Oklahoma, who presented H.

R. 7764 in the Senate, when he said: 'The bill authorizes the appropriation of money for that purpose (to pay the taxes).' Then he added: 'Section 2 provides that the lands so secured shall hereafter be nontaxable.'

"*So it is apparent that the exemption was intended to apply to lands purchased for Indians as homes or homesteads.* The necessity for the correction of this mistake is apparent when it is stated that probably 20 per cent of the otherwise taxable property in one county in Oklahoma would be exempt from taxation if section 2 were permitted to stand.

"Representatives from the Indian Office were present when your committee considered this legislation and stated that they had no objection to this bill if it is amended so homesteads were exempt from taxation.

"This bill received the unanimous vote of your committee.

"* * *."

We found three cases relating to land allotted to the five civilized tribes which indicated that possibly under that particular allotment, the term "homestead" was merely a term used to distinguish one 160 acre tract of land allotted from two other similar tracts which were known as "surplus." These cases are: *Hyde* v. *Ishmael*, 42 Okla. 279, 143 Pac. 1044; *Sperry Oil and Gas Company* v. *Chisholm*, 282 Fed. 93; and *Hayes* v. *Barringer*, 7 Ind. Ter. 697, 104 S. W. 937. In these three cases it is to be noted that the property involved was actually the homestead of the Indian involved where he made his home, and the discussion as to what the term meant in the

Indian allotment was dictum. In the Ishmael case a deed to the homestead signed only by the husband was set aside because it was not executed also by the wife which made it void under the Oklahoma law, although under the federal statute providing for the allotment it might have been sold by the Indian owner with the permission only of the Secretary of the Interior. The same situation was present in the Sperry Oil and Gas Company case where the Indian, who, while single had made an oil and gas lease, renewed it after his marriage and it was held that it must also be signed by the wife under the state law. The Hayes case merely provided that the homestead might be disposed of by will.

We believe it is clear that under the law in question, the term "homestead" must be held to mean the land or property upon which the Indian lives with his dependents, or at least upon which they are preparing to live; and to sustain its complaint in these cases, complainant must prove that the properties sought to be exempted were actually the homesteads of the Indians involved.

There appears to be no confusion in the Congressional act as to what it covers. The act reads "*all homesteads*, heretofore purchased * * *." The only confusion appears to be in the method of administering the law, it being claimed by those administering it that all the Indian has to do is call a thing a homestead and it becomes a homestead. The congressional committee report, in considering the 1937 act, gave as their reason for changing the 1936 act that "* * * said act * * * would exempt from taxation vast quantities of property, such as business buildings, *farm lands which are not homesteads*," etc.

The Senate Committee, referring to the same legislation, said, "Under this mistaken legislation vast quantities of otherwise taxable property such as business buildings, farm lands which *are not homesteads,* etc., are exempt from taxation." In the same senate report they also said, "So it is apparent that the exemption was intended to apply to lands purchased for Indians as *homes or homesteads.*"

Under the interpretation given the acts by the lower court the word homestead was given no meaning whatever. The words used by Congress for the sole purpose of limiting the size of the estate and to designate the funds from which purchased, were held to define the land to be exempted.

The statute provides us with no definition of the term "homestead" other than such is implicit in the term itself. Had Congress merely provided that the homestead of each Indian shall be exempt without further qualification, we do not believe the lower court would have held the act void for uncertainty, nor do we believe that he should have. It would have been construed as Congress and as everyone else understands it, as the home of the individual and his family.

The lower court based his holding partly upon the basis that there would be confusion if definitions of the word by various state statutes were adopted, and he mentioned that even in Nebraska there are two or three different meanings of the term "homestead." We believe that he was laboring under a misconception. In Nebraska there is only one definition of homestead, and that is the home in which the head of a family lives or intends

to live with his family. It is true, however, that for different purposes, the size of the homestead or the value which may be claimed as a homestead is different. For instance, there is exempt from creditors a homestead not exceeding two thousand dollars in value, but there descends to a spouse a homestead regardless of its value. Nevertheless, the homestead in each instance is the family home and cannot mean anything else. There could be no confusion caused by construing the act here in question to mean home, which Congress very evidently meant that it should mean, and limiting it to size and value according to the provisions of the act. This would give a uniform construction throughout the United States and would carry out the purpose of Congress.

The definition of this term has not been in controversy in any other case decided by this court. It is of very wide importance in every state where Indians reside, and if this act is to be left in operation in any state, this court should properly define the word "homestead" for guidance of the people who administer the law.

Point 4.

Taxes Paid by Any Private Citizen Can be Recoverd Only by Following the Simple Method Provided by State Statutes, in Connection With Which the Cities, School Districts and Other Subdivisions to Which the Taxes Have Been Distributed Would be Indispensable Parties.

Bankers Life Association v. *Douglas County*, 61 Neb. 202, 85 N. W. 54.

Creek County v. *Seber*, 130 Fed. (2d) 663.

Great Lakes Dredge & Dock Company v. *C. C. Huffman, Adm., etc.*, 319 U. S. 293, 87 L. Ed. 1407.

Janike v. *Butler County*, 103 Neb. 865, 174 N. W. 847.

Radium Hospital v. *Greenleaf*, 118 Neb. 136, 223 N. W. 667.

Riggs-Orr Company v. *City of Omaha*, 130 Neb. 697, 266 N. W. 430.

South Omaha v. *McGavock*, 72 Neb. 382, 100 N. W. 805.

Revised Statutes 1943, Sec. 77-1701.

Revised Statutes 1943, Sec. 77-1728.

Revised Statutes 1943, Sec. 77-1729.

Revised Statutes 1943, Sec. 77-1731.

Revised Statutes 1943, Sec. 77-1733.

Revised Statutes 1943, Sec. 77-1754.

Revised Statutes 1943, Sec. 77-1760.

Revised Statutes, 1943, Sec. 77-1761.

City National Bank v. *School District of Lincoln*, 121 Neb. 213, 236 N. W. 616.

Jordan v. *Evans*, 99 Neb. 666, 157 N. W. 620.

Monteith v. *Alpha High School*, 125 Neb. 665, 251 N. W. 661.

A citizen of Thurston County, Nebraska, remains a citizen of Thurston County, Nebraska, even though the United States may be his guardian. There is no transfer of privileges and immunities possessed by a guardian to his ward just on account of that relationship. An Indian in Thurston County does not become the United States of America because the United States is his guardian. If the Indian citizen pays his taxes under protest, he

may recover them by following the same simple procedure set up by Nebraska law, the same as any other citizen. This will in no way interfere with the guardianship of the United States over the Indian ward, nor prevent the United States from assisting him in any way it desires.

The county treasurer is ex-officio collector of taxes for all tax units as required by Section 77-1701, Rev. St. 1943, set out in margin. *(1) If any person claims a tax to be invalid for the reason that property upon which it was levied was not subject to taxation, Section 77-1728, Rev. St. 1943; *(2) he may protect his interest by

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Note 1. Sec. 77-1701. Collection of taxes; county treasurer tax collector; no demand required. The county treasurer shall be ex-officio county collector of all taxes levied within his county.

Note 2. Sec. 77-1728. Collection of taxes; procedure to test invalidity; methods authorized. In every case the person or persons claiming any tax, or any part thereof, to be for any reason invalid, shall pay the same to the county treasurer and may then proceed as follows:

(1) If such person claim a tax, or any part thereof, to be invalid for the reason that the property upon which it was levied was not liable to taxation, or that the property has been twice assessed in the same year and taxes paid thereon, he shall proceed under Sections 77-1729 to 77-1734;

(2) If such person claim that the tax, or any part thereof, be invalid for the reason that it was levied or assessed for an illegal or unauthorized purpose or for any other reason except as hereinbefore set forth, he shall proceed under Sections 77-1735 to 77-1736.

Note 3. Sec. 77-1729. Collection of taxes; payment under protest; when. Where claim is made that the tax is invalid for the reason that the property upon which it was levied was not liable to taxation, or that property has been twice assessed in the same year and tax is paid thereon, the taxpayer may pay such taxes under protest to the county treasurer, or other proper authority, and it shall be the duty of the treasurer, or other proper authority receiving such tax, to give a receipt therefor stating thereon that they were paid under protest, and the grounds of such protest, whether or not taxable or twice assessed, and taxes paid thereon.

following the procedure set out in Section 77-1729 *(3), Section 77-1731 *(4), and Section 77-1733 *(5).

Under Section 77-1754 *(6), the county treasurer must pay amounts collected for the state, to the state treasurer monthly before the 10th of the month, and that collected for towns and school districts, upon demand. Section 77-1760 *(7), and Section 77-1761 *(8).

Note 4. Sec. 77-1731. Collection of taxes; payment under protest; statement of grounds. Within thirty days after paying taxes under protest, the person paying them shall file a statement in writing, duly verified, with the county board, setting forth the amount of tax paid under protest, the grounds of such protest, and shall attach thereto the receipt taken for said taxes.

Note 5. Section 77-1733. Collection of taxes; payment under protest; appeals; order on appeal. Appeals may be taken from the decisions of the county board entered under Section 77-1732 in the same manner and within the time as appeals are now taken from the action of the county board in allowance or disallowance of claims against the county; and if such an appeal be taken, the county treasurer shall retain such taxes until the case is finally determined; Provided, he shall in all cases retain said money until the time for an appeal shall have elapsed. If an appeal from the decision of the county board be taken, and upon the final determination thereof its decision be affirmed, the treasurer shall at once carry the order of the board into effect; but if its decision be reversed, it shall issue a new order to the treasurer conforming to the decree of the court finally determining the case.

Note 6. Sec. 77-1754. Collection of taxes; county treasurer; monthly remittance to State Treasurer. The treasurers of the several counties shall pay into the State Treasury all funds in their hands belonging thereto on or before the tenth day of each month, and at such other times as the State Treasurer shall require. The sums so paid in shall be the identical state warrants, if any received by the treasurer for payment of the taxes, or in coin or in treasury notes of the United States.

Note 7. Sec. 77-1760. Collection of taxes; failure to report and pay taxes by county treasurer; suit on bond. If any county treasurer fails to make reports and payments required by Sections 77-1751 to 77-1759, for five days after demand made, the Auditor of Public Accounts or such other authority or person may bring suit upon his bond.

Note 8. Sec. 77-1761. Collection of taxes; failure to report and pay taxes by county treasurer; removal from office. If any county treasurer fails to account for and settle as required in Section 77-1760, his office may be declared vacant by the county board, and the vacancy filled as hereinbefore provided.

If the county treasurer fails to follow the provisions of these statutes, his office may be declared vacant by the county board (Sec. 77-1761 *[8]), as well as being subject to other penalties as are in such cases commonly provided.

Taxes for the year 1939, on the land described in count 6, case 235, were paid by a tenant (Rec. p. 104,-b), as were taxes on the SE¼ of the NW¼ of Section 29, further described in count 7, case 235 (Rec. p. 105,-c), and taxes on land described in count 3, case 247 (Rec. p. 105,-f), and as indicated in the record at the pages above referred to in this paragrah, none of these taxes were paid under protest and no claim was filed with the county board for the recovery thereof. None of these tenants are parties to this suit, and a judgment directing that the money paid in by them be recovered for other persons cannot be sustained upon any theory of law or equity.

A detailed statement of how all of the taxes now sought to be recovered were paid, is shown at Record, pages 104 and 105,-12. Some of these taxes were paid under protest and some were not. A letter was sent to the Board of County Commissioners by the Superintendent of Indians, advising as to a part of the taxes, that they had been paid under protest because of the provisions of the act here involved. However, no claim for refund was filed for any of them, as required by the law set out in notes 1 to 8, inclusive.

The Supreme Court of Nebraska has held that this method is exclusive. *Janike* v. *Butler County*, 103 Neb. 865, 174 N. W. 847; *Radium Hospital* v. *Greenleaf*, 118

Neb. 136, 223 N. W. 667; *Bankers Life Association* v. *Douglas County*, 61 Neb. 202, 85 N. W. 54; *South Omaha* v. *McGavock*, 72 Neb. 382, 100 N. W. 805; *Riggs-Orr Company* v. *City of Omaha*, 130 Neb. 697, 266 N. W. 430.

The record clearly shows that plaintiff made no attempt whatever to comply with the procedure set forth in the Nebraska statutes. It is against equity to bring matters in equity that are clearly provided for in other proceedings.

Had the plaintiff proceeded according to the procedure set out, the county treasurer would under the statute have held the money where it would be available for repayment should the court find that the taxes should not have been collected. In the absence of payment under protest and the filing of a claim, as required by the statute, the county treasurer was compelled under the Nebraska statutes to make distribution of the taxes collected to the other taxing subdivisions and to the state. It is admitted in the record that this has been done and that the treasurer no longer has the money.

> "That all funds paid by the plaintiff or the Indian owners to the County Treasurer, Thurston County, Nebraska, to satisfy taxes assessed against the lands or lots involved in these actions, for which the plaintiff now seeks a money judgment against Thurston County, Nebraska, were received by the County Treasurer of Thurston County, Nebraska, and were by her distributed and paid to the various taxing authorities entitled thereto as requred by Section 77-1940, C. S. 1929 (Rev. Stat. 1943, Ch. 77, Secs. 1754, 1760 and 1761). That all of said funds which the plaintiff now seeks to recover were so paid and

> distributed to the various taxing authorities by the County Treasurer prior to the filing of Cases No. (fol. 84) 235, 246, 247 and 299 in the District Court of the United States for the District of Nebraska, Omaha Division, said cases being entitled The United States of America v. The County of Thurston, et al." (Record pp. 71-6).

This question was raised in *Creek County* v. *Seber,* before the Circuit Court of Appeals, the case being reported in 130 Fed. (2d) 663. In that case, the Circuit Court of Appeals of the Tenth Circuit stated:

> "But it is true, as the appellants concede, that the appellees were put to the choice of either paying the taxes assessed and levied against the property, or having the land sold to satisfy the same as provided by the laws of Oklahoma. The taxes were therefore not paid voluntarily, but under compulsion and duress."

Then they go on to say that this exemption is not subject to violation by the state tax laws or administrative officials and that so far as the state taxing power is concerned the exempt lands do not exist and that all proceedings of the taxing power having as their effect a violation of this exemption are without jurisdiction and void. It should be recognized that under the Nebraska law there is no such compulsion as results from a choice to either pay the taxes or have the property sold. The taxpayer can pay the tax under protest and file a claim for a return of the money paid and test before the county board, and, if turned down by them, before the courts of the state and nation, whether or not the property is exempt from taxation. This is an

orderly procedure which preserves and protects the rights of the taxpayer and the sovereignty the state. Not to follow the statute of Nebraska simply causes confusion, which is well represented in the present cases where the money was paid into the county treasurer and distributed to the other taxing subdivisions as required by law and then a suit filed against the county treasurer and not against the other taxing subdivisions to recover the money.

The United States Supreme Court discussed such a state law in a recent case. The Great Lakes Dredge & Dock Company, disregarding the provisions of the state statute, had attempted to have their rights determined and the state law tested in a suit in the federal court for a declaratory judgment. The Supreme Court of the United States, in its opinion entered on May 24, 1943, stated as follows:

> "In answering it the nature of the remedy afforded to taxpayers by state law for the illegal exaction of the tax is of importance. Section 18 of Article 10 of the Constitution of Louisiana of 1921 directs that: 'The Legislature shall provide against the issuance of process to restrain the collection of any tax and for a complete and adequate remedy for the prompt recovery by every taxpayer of any illegal tax paid by him.' And Act 330 of 1938 sets up a complete statutory scheme to carry into effect the constitutional provision. By it the courts of the state are forbidden to restrain the collection of any state tax; and any person aggrieved and 'resisting the payment of any amount found due, or the enforcement of any provision of such laws in relation thereto' shall pay the tax to the appropriate state officer and file suit

for its recovery in either the state or federal courts. Pending the suit the amount collected is required to be segregated and held subject to any judgment rendered in the suit. If the taxpayer prevails in the suit, interest at two per cent per annum is added to the amount of taxes refunded.

"This Court has recognized that the federal courts, in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding the extraordinary relief which they may afford, will not ordinarily restrain state officers from collecting state taxes where state law affords an adequate remedy to the taxpayer. Matthews v. Rodgers, 284 U. S. 521. This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts or of the settled rule that the measure of inadequacy of the plaintiff's legal remedy is the legal remedy afforded by the federal not the state courts. Stratton v. St. L. S. W. Ry., 284 U. S. 530, 533-34; Di Giovanni v. Camden Ins. Assn., 296 U. S. 64, 69. On the contrary, it is but a recognition that the jurisdiction conferred on the federal courts embraces suits in equity as well as at law, and that a federal court of equity, which may in an appropriate case refuse to give its special protection to private rights when the exercise of its jurisdiction would be prejudicial to the public interest (United States v. Dern, 289 U. S. 352, 359-360; Virginian Ry. v. Federation, 300 U. S. 515, 549-53), should stay its hand in the public interest when it reasonably appears that private interests will not suffer. See Pennsyvlania v. Williams, 294 U. S. 176, 185, and cases cited.

"It is in the public interest that federal courts of equity should exercise their discretionary power to

grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.

" 'The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts and a proper reluctance to interfere by injunction with their fiscal operations, requires that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved.' Matthews v. Rodgers, supra, 525-26. Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and necessarily attends injunctions, interlocutory or final, restraining collection of state taxes. These are considerations of moment which have persuaded federal courts of equity to deny relief to the taxpayer—especially where the state, acting within its constitutional authority, has set up its own adequate procedure for securing to the taxpayer the recovery of an illegally exacted tax.

"Congress recognized and gave sanction to this practice of federal equity courts by the Act of August 21, 1937, 50 Stat. 738, enacted as an amendment to Section 24 of the Judicial Code, 28 U. S. C. § 41(1). This provides that 'no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the

assessment, levy, or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state.' The earlier refusal of federal courts of equity to interfere with the collection of state taxes unless the threatened injury to the taxpayer is one for which the state courts afford no adequate remedy, and the confirmation of that practice by Congress, have an important bearing upon the appropriate use of the declaratory judgment procedure by the federal courts as a means of adjudicating the validity of state taxes.

"The considerations which persuaded federal courts of equity not to grant relief against an allegedly unlawful state tax, and which led to the enactment of the Act of August 21, 1937, are persuasive that relief by way of declaratory judgment may likewise be withheld in the sound discretion of the court. With due regard for these considerations, it is the court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes."

Great Lakes Dredge & Dock Company v. C. C. *Huffman, Adm., etc.*, 319 U. S. 293, 87 L. Ed. 1407.

Is a county treasurer supposed to follow the law or must he follow the requests of the various empoyees of

the Indian Bureau, who refuse or neglect to follow the simple provisions of the law?

The only defendants in this suit are the County of Thurston, the members of the Board of Equalization of said County, the county assessor and the county clerk in those capacities, as well as in the capacity of member of the Board of Equalization, and the county treasurer in her official capacity. The State of Nebraska is not a party, neither are the Villages of Winnebago or Walthill, nor are any of the school districts in which is situated land involved in these complaints.

By stipulation of facts, the record shows that all of the money paid in for taxes and for which a money judgment is asked has long since been distributed by the county treasurer to the state and the other taxing subdivisions, as required by law (Rec. p. 71,-6). The prayer is for a money judgment generally against all of the defendants for all of the taxes claimed to have been paid.

In the case of *City National Bank* v. *School District of Lincoln*, 121 Neb. 213, 236 N. W. 616, the first paragraph of the syllabus is as follows:

> "In demanding refund of school taxes, notice to county treasurer is not notice to 'treasurer of district' contemplated by statute. Comp. St. 1929, Section 77-1923, provides that, as a condition precedent to bringing suit to recover an invalid tax, it is necessary that a demand in writing be made on the treasurer of the district."

In its opinion, the court said:

> "For convenience, the Legislature has by statute made the county treasurer ex officio collector of taxes for the school districts within the county. Comp. St. 1929, Section 77-1901. He shall report and pay all of the amount of said taxes upon demand. If he fails to report and pay within 5 days after demand by the proper authority of the district, he may be sued on his bond. To collect and pay over within 5 days to the district is his only duty. Comp. St. 1929, Paragraphs 77-1944, 77-1945. There was an attempt made in this case to give the notice required by section 77-1923, Comp. St. 1929, by notifying the county treasurer. Such notice is not the notice to the treasurer of the district as contemplated by the statute."

To the same effect is the case of *Monteith* v. *Alpha High School*, 125 Neb. 665, 251 N. W. 661.

The Supreme Court of Nebraska has defined indispensable parties as follows:

> "Indispensable parties to a suit are those who not only have an interest in the subject-matter of the controversy but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."
>
> *Jordan* v. *Evans*, 99 Neb. 666, 157 N. W. 620.

Had the money been paid under protest and a claim filed as provided for by the Nebraska statute, the money would have been held by the county treasurer until the

claim had been heard and disposed of by the courts. As this was not done, the money had to be paid and was paid to the governmental subdivisions for which it was collected. None of these subdivisions except the county is a party to this suit. Even if the tax were invalid, which we deny, how can any of the defendants in this suit be charged with returning it except perhaps for that small part which went to the County of Thurston. None of the parties to this suit would have any recourse to reimburse themselves should this court order them to refund the taxes paid. A judgment requiring any of these defendants to refund such taxes would not be lawful and would be wholly inconsistent with equity and good conscience.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, because the questions of general and constitutional law and statutory construction which are raised are of the utmost importance not only to the petitioners herein but to the people and the state and local governmental subdivisions in every one of the many states where Indians own property; and the law should be clearly expounded by this court for the guidance of the inferior courts in future litigation, of the executive officers in the performance of their duties, and of Congress in connection with similar legislation in the future, and that to such an end a writ of certiorari should be granted, and this court should review the decision of the lower court, and finally reverse it.

Respectfully submitted,

ALFRED D. RAUN,
County Attorney of Thurston County,

WALTER R. JOHNSON,
Attorney General of Nebraska,

H. EMERSON KOKJER,
Deputy Attorney General of Nebraska,
Counsel for Petitioners.

Dated at Lincoln, Nebraska,
August 17, 1945.

No. 842

In the Supreme Court of the United States

OCTOBER TERM, 1945

COUNTY OF THURSTON IN THE STATE OF NEBRASKA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (R. 79–97) is reported in 54 F. Supp. 201. The *per curiam* opinion of the Circuit Court of Appeals (R. 161–163) is reported in 149 F. 2d 485.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on May 22, 1945 (R. 163). The petition for a writ of certiorari was filed on August 21, 1945. The

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jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Acts of Congress of June 20, 1936, and May 19, 1937, declaring certain Indian lands nontaxable, are constitutional as applied to lands in Nebraska.

2. Whether the lands involved are homesteads within the meaning of the Act of May 19, 1937.

3. Whether the United States may maintain an action to enjoin the taxation of Indian lands, and to recover taxes paid, without following state procedure.

STATUTES INVOLVED

The Act of June 20, 1936, 49 Stat. 1542, provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That there is hereby authorized to be appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of $25,000, to be expended under such rules and regulations as the Secretary of the Interior may prescribe, for payment of taxes, including penalties and interest, assessed against individually owned Indian land the title to which is held subject to restrictions against alienation or encumbrance except with the con-

sent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of an Indian, where the Secretary finds that such land was purchased with the understanding and belief on the part of said Indian that after purchase it would be nontaxable, and for redemption or reacquisition of any such land heretofore or hereafter sold for nonpayment of taxes.

SEC. 2. All lands the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress.

The Act of May 19, 1937, 50 Stat. 188, provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of Public Law Numbered 716 of the Seventy-fourth Congress, being an Act entitled "An Act to relieve restricted Indians whose lands have been taxed or have been lost by failure to pay taxes, and for other purposes", is hereby amended to read as follows:

SEC. 2. All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared

to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress: *Provided,* That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior: *And provided further,* That the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town, or city property, not exceeding in cost $5,000, to be designated as a homestead.

STATEMENT

By the Act of June 20, 1936, *supra,* 49 Stat. 1542, Congress declared that all lands previously purchased out of trust or restricted funds of an Indian and held subject to restrictions against alienation except with the approval of the Secretary of the Interior are instrumentalities of the Federal Government, and nontaxable until otherwise directed. This Act was amended by the Act of May 19, 1937, *supra,* 50 Stat. 188, which limited the exemption to certain designated "homesteads." Despite these Acts of Congress, the County of Thurston assessed taxes for 1936 and subsequent years against lands purchased out of the restricted funds of Indians, held subject to restrictions against alienation, and designated as "homesteads" under the 1937 Act, the contention of the county

being that Congress had no authority to remove from the tax rolls lands privately owned and formerly subject to state taxation (R. 47–49, 102–104). The taxes were paid by the Indians under coercion and for the most part under protest (R. 102–104, 125), but in no case was there a strict compliance with the requirements of the law of Nebraska for the recovery of taxes alleged to be illegally assessed (R. 104–105).

The United States filed four complaints containing 22 counts, alleging that 22 tracts owned by individual Omaha and Winnebago Indians were tax-exempt by reason of the 1936 and 1937 Acts and praying for recovery of the taxes paid, an injunction against the collection of taxes assessed and the sale of the properties for delinquent taxes, the cancellation of the levy of the taxes, and an injunction against future assessments (R. 1–43). The County of Thurston and its officials connected with the assessment and collection of taxes were made parties defendants (R. 2, 12–13, 20, 28). With the agreement of all parties the four cases were consolidated for trial (R. 50), and the material facts were stipulated (R. 50–51, 101–119).

The district court wrote a lengthy opinion in which it analyzed all of the contentions urged (R. 79–97). It held that Congress had the power to exempt the restricted purchased lands of its wards from state taxation despite the fact that

the lands had at one time been patented in fee to whites and had been legally on the tax rolls (R. 82–89, 121). The court also concluded that all the lands were "homesteads" within the meaning of the 1937 Act and were exempt from taxation for 1937 and subsequent years although some of the parcels did not qualify as homesteads under Nebraska law (R. 94–95, 122–123). Judgments were entered granting relief substantially as prayed (R. 126–143). Upon appeal by petitioners the judgment was affirmed. A *per curiam* opinion expressed agreement with the trial court's decision upon each issue and with its reasoning (R. 162–163).

ARGUMENT

1. This Court's decision in *Board of Commr's* v. *Seber,* 318 U. S. 705 is conclusive that the 1936 and 1937 Acts are constitutional. The sources of the power of Congress are fully set forth in that opinion (pp. 715–719). See also *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598, 602, 611. We submit that none of the authorities nor the arguments advanced by petitioners tend to indicate that this Court erred in sustaining the power of Congress to exempt Indian lands from local taxation nor do they suggest any valid reason why this Court's decision in the *Seber* case should be reexamined. As this Court pointed out in the *Seber* case (p. 718), contentions based upon the alleged financial embarrassment to local gov-

ernmental units should be addressed to Congress, not the courts. The fact that the Nebraska Enabling Act does not, like that of Oklahoma, specifically reserve the rights of the Federal Government to legislate for the Indians does not alter the results (cf. Pet. 22–23, 47). As the district court pointed out (R. 84), this Court's decision in the *Seber* case did not rest upon the provisions of the Oklahoma Enabling Act but rather upon the authority of the Federal Government in Indian Affairs. Moreover, the Enabling Act could not have provided a source of power to deny to Oklahoma rights enjoyed immutably by other states. *Coyle* v. *Oklahoma,* 221 U. S. 559, 566–574; *Ex parte Webb,* 225 U. S. 663, 690–691.

2. This Court's decision in the *Seber* case likewise disposes of the contention (Pet. 53–62) that the lands in question were not homesteads. In the 1937 Act Congress indicated that by a "homestead" it meant land (a) purchased before May 19, 1937, out of the trust or restricted funds of individual Indians; (b) held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior; (c) selected for designation as a homestead by its Indian owner or owners with the approval of the Secretary; and (d) containing not more than a total of 160 acres, if agricultural land, and not ex-

ceeding $5,000.00 in cost, if urban property. It is agreed that all the lands whose status as "homesteads" is questioned meet these four requirements (R. 9, 23, 28–31, 32–33, 35, 40–41, 102–104), and this has been held sufficient to invoke the exemption granted by the 1937 Act. *Board of Comm'rs* v. *Seber,* 318 U. S. 705, 712.

As the district court pointed out (R. 94–95), the term "homestead" is variously defined in Nebraska law for various purposes. Plainly, Congress rather than adopting the varying definitions under local law, established in the 1937 Act its own definition of "homestead" under which four conditions must be met. *Muskogee County* v. *United States,* 133 F. 2d 61, 64 (C. C. A. 10). There is nothing unusual in use of the term "homestead" for purposes of classification of Indian lands. Cf. *Sperry Oil Co.* v. *Chisholm,* 264 U. S. 488. Since Congress specifically set forth the conditions under which the tax exemption could be obtained, additional conditions may not be read into the statute requiring conformance to the various local definitions of "homesteads".

3. Petitioners assert (Pet. 62–75) that it was compulsory that the local procedure for the recovery of illegal taxes be followed. The trial court found that the taxes were collected coercively (R. 122) and formal protest was made in most instances (R. 104–105). Since the taxes were paid

involuntarily, the United States, in order to fulfil its duty of protecting its Indian wards, was authorized to maintain these actions on behalf of its wards without first meeting the procedural requirements of the Nebraska law. *Board of Comm'rs* v. *United States,* 308 U. S. 343, 350–351; *United States* v. *Dewey County,* 14 F. 2d 784, 791 (D. S. D.) affirmed 26 F. 2d 434 (C. C. A. 8); *United States* v. *Nez Perce County, Idaho,* 95 F. 2d 232, 236 (C. C. A. 9); *Muskogee County* v. *United States,* 133 F. 2d 61, 63 (C. C. A. 10). While contending for a contrary result, petitioners make no attempt to show that these decisions are erroneous.[1] *Great Lakes Co.* v. *Huffman,* 319 U. S. 293, relied upon by petitioners (Pet. 69–72), involved only private parties, and petitioners' argument is that the Indians should be subject to the same restrictions as other citizens of Nebraska. But an entirely different question arises when, as here, the action is brought by the United States pursuant to its obligation to protect its Indian wards. Even if the individual Indian might be bound by such local restrictions, these do not bind

[1] Even under State law an injunctive suit is proper without regard to the usual procedural requirements when, as here, the tax complained of is levied upon tax-exempt property. *East Lincoln Lodge No. 210, A. F. & A. M.* v. *Lincoln* 131 Neb. 379, 380–385. Moreover, the fact that the taxes had been distributed to other governmental agencies, not made parties to the suit (cf. Pet. 73–75), is immaterial. *McDonald* v. *Lincoln County,* 121 Neb. 741, 750–751).

the United States in executing its governmental duties, as the above-cited cases demonstrate.

CONCLUSION

The decision below is correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

HAROLD JUDSON,
Acting Solicitor General.
J. EDWARD WILLIAMS,
Acting Head, Lands Division.
ROGER P. MARQUIS,
Attorney.

SEPTEMBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945

In The

SUPREME COURT OF THE UNITED [illegible]

No. 352, October Term, 1945

COUNTY OF THURSTON IN THE STATE OF NEBRASKA, ET AL., PETITIONERS,

v.

THE UNITED STATES OF AMERICA

PETITION FOR [illegible]

ALFRED D. RAUH,
County Attorney of [illegible]

WALTER R. JOHNSON,
Attorney General of [illegible]

H. EMERSON KNOWLES,
Deputy Attorney General,
Counsel for [illegible]

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In The

SUPREME COURT OF THE UNITED STATES

No. 352, October Term, 1945

COUNTY OF THURSTON IN THE STATE OF NEBRASKA, ET AL., PETITIONERS,

V.

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING

ALFRED D. RAUN,
County Attorney of Thurston County,
WALTER R. JOHNSON,
Attorney General of Nebraska,
H. EMERSON KOKJER,
Deputy Attorney General of Nebraska,
Counsel for Petitioners.

Come now the above named petitioners and present this, their petition for a rehearing of the above entitled cause, and in support thereof respectfully say:

The very serious situation in which the court's decision leaves the people of Thurston County, Nebraska, and their local governmental subdivisions impels us to make this further effort in their behalf. We are encouraged to ask for a rehearing by the sincere conviction that when certiorari is granted and it becomes necessary for any member of this court to actually write an opinion in this case he will find it impossible, after an argument upon the facts and a review of the law to write one which will satisfy him as to logic, law and equity without reversing the lower court.

This court has taken two positions which are diametrically opposed to each other.

The first position was adopted and has been followed as a matter of course from the time our government was formed and is succinctly stated in the case of *State Tax Commissioner of Utah* v. *Malcom P. Aldrich, et al.*, 316 U. S. 174, 86 L. Ed. 1358, as follows:

> "The taxing power is an incident of government. It does not derive from technical legal concepts. The power to tax is coextensive with the fundamental power of society over the persons and things made subject to tax. Each State of the Union has the same taxing power as an independent government, except insofar as that power has been curtailed by the Federal Constitution.
>
> "The taxing power of the States was limited by the Constitution and the original ten amendments in only three respects: (1) no State can, without the consent of Congress, lay any imposts or duties on imports or exports, except as necessary for executing its inspection laws, Art. I, Sec. 10 (2); (2)

> no State can, without the consent of Congress, lay any tonnage duties, Art. I, Sec. 10 (3); and (3) by virtue of the Commerce Clause, Art. I, Sec. 8 (3), no State can tax so as to discriminate against interstate commerce."

The position above stated is so clearly right that there is no possibility of anyone disagreeing with it. It is as though the court had held that the tide ebbs and flows twice in twenty-four hours or that the United States Capitol has two wings and a dome and is constructed of stone.

The court's second position, which cannot be right if the first position is correct, was taken in connection with the law passed by Congress on May 19, 1937, 50 Stat. 188, which provides in part as follows:

> "Sec. 2. All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress: *Provided*, That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior; *And provided further*, That the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town, or city property, not exceeding in cost $5,000, to be designated as a homestead."

This law unquestionably purports to limit the taxing power of the states. The limitation is not permitted in any of the existing exceptions.

In the case of *Board of County Commissioners* v. *Seber*, 318 U. S. 705, 87 L. Ed. 1094, this court held that Congress did have the power to limit by that statute the taxing power of the states. A careful examination of the Seber case will show that the reasoning is specious and that there is no foundation in the Constitution nor the cases cited for the decision as pointed out in our original brief filed in connection with petition for writ of certiorari, pages 39 to 47, inclusive.

In the present case the lower court felt constrained to follow the Seber case as indicated in the opinion beginning at the bottom of page 82 of the Record, as follows:

> "During the pendency of these cases the major constitutional issue appears to the court to have been determined with finality in favor of the plaintiff. The issue has been squarely presented; and it has been held that the action of the Congress in according lands of this character the privilege of exemption from state taxation is within its legislative power, and that the two cited sections are constitutional. Board of County Commissioners v. Seber, 318 U. S. 705, 63 S. Ct. 920, 87 L. Ed. 807; * * *.
>
> "The Supreme Court having thus unequivocally affirmed the validity of the statutes under consideration, it would be altogether presumptuous for this court to examine, or assume to sustain, its conclusion. And that will not be undertaken. * * *"

Following that, the lower court, on page 94, added a further error by holding that to qualify as a "homestead" under this statute land must only,

> "(a) have been purchased before May 19, 1937 out of the trust or restricted funds of individual Indians; (b) be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior; (c) be selected for designation as a homestead by its owner or owners with the approval of the Secretary of the Interior; (d) be not more than a total of one hundred and sixty acres in extent, if agricultural and grazing lands, or cost not more than $5000.00, if urban property."

Under this definition, which will be treated as tacitly approved by this court unless certiorari is granted, the following could result: A five thousand dollar saloon or a flour mill or a race track, if urban property, could be designated as a homestead and taken off of the state tax rolls; likewise, 160 acres of rural property good for nothing but the growing of wild rice and muskrats. Some lands were actually held exempt which come as near being homesteads within the congressional intent as those above mentioned.

The holding that Congress has the power to exempt from state taxation land owned in fee simple by any class of individuals, whether it be Indians, Negroes, Irishmen, postmasters or any other class group, and the court's definition of "homestead" seem to us to be as clearly wrong as if the court had solemnly held that the tide ebbs and flows only once in twenty-four hours or

that the United States Capitol is shaped like an apple and is constructed of green cheese.

We are not trying to be funny. We make these comparisons sincerely and with all due respect. We do, however, feel very deeply that the court was wrong and that it owes it to itself as well as to the people of Thurston County, Nebraska, to carefully review the law and the facts and correct this error. The people of Thurston County, Nebraska, and their local subdivisions do not deserve to have this unfair, discriminatory and inequitable burden fastened upon them.

The root of the whole trouble is in the Seber decision. If the result in that case was right under the facts peculiar to it, it was not right under any theory that the Federal Constitution granted the power, but only because of a combination of three circumstances. First, the Oklahoma enabling act reserved in Congress the power to legislate fully as to land owned by Indians; second, the people of Oklahoma in their Constitution granted this right to Congress; and third, the Supreme Court of Oklahoma in the case of *Wynn* v. *Fugate*, 149 Okla. 210, 299 Pac. 890, held that under the law of Oklahoma Congress did have the power to remove from state taxation land owned in fee by Indians.

The thesis upon which the Seber decision is based seems to be that the United States is morally bound to provide for the Indians, and, having taken over that duty, Congress has a "paramount power" or an "undoubted power" to pass any kind of a law necessary to carry out that duty. This reasoning is specious. In the

first place, Congress has no source of power outside of the Constitution; in the second place, the Indians can be given everything and anything that Congress desires to give to them without interfering in the slightest degree with the power of the states to tax the property owned by private individuals within their borders. In other words, if necessity can be considered a source of power, it must be taken into consideration that there is no necessity for taking the property of one class of citizens off of the tax rolls, thereby shifting their tax burden to their neighbors or depriving the local government of needed support. The Congress instead can appropriate the money out of the federal treasury to pay the taxes if they see fit.

Suppose Congress should decide that the Indians should have a practical education in state government and that under the "paramount power" or "undoubted power" theory they would pass a law providing that the Nebraska Unicameral Legislature and the various state offices are instrumentalities of the federal government and only Indians could be elected thereto so that they could be properly educated in government. Could such a law be deemed necessary and within the power of Congress? On the face of it that is absurd. How much more absurd is it, however, than to hold that Congress has a power "not expressly granted in so many words by the Constitution" but "its existence cannot be doubted," to deprive a state and its local subdivisions of the power to tax uniformly all the real estate owned in fee simple by private citizens within their borders, thus depriving them of financial support indispensable to their continued existence.

The rule of stare decisis does not stand in the way of overruling an earlier erroneous decision. The Supreme Court has often overruled its earlier decisions upon taking into account the lessons of experience and the force of better reasoning. Many cases support this view. See Notes 2, 3, and 4 to the dissenting opinion of Mr. Justice Brandeis, Mr. Justice Roberts, and Mr. Justice Cardozo in the case of *Burnet* v. *Coronado Oil and Gas Co.*, 285 U. S. 404, 76 L. Ed. 823.

In *Barden* v. *Northern P. R. Co.*, 154 U. S. 288, 38 L. Ed. 992, the court said:

> "It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience."

This is especially true in cases involving the Federal Constitution where correction through legislative action is practically impossible. In the instant case, even though it were practicable to correct the court's decision by a constitutional amendment, it would be difficult to word an amendment which would more clearly limit the power of Congress to remove from state taxation real estate owned in fee simple by individuals than the Constitution already contains.

For the foregoing reasons, it is respectfully urged that a rehearing be granted and that a writ of certiorari be issued out of and under the seal of this honorable court, in compliance with the original petition filed herein, and that the decree of the lower court be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, H. Emerson Kokjer, one of the counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

H. Emerson Kokjer